86-749

No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
Petitioner,

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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November 1986

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QUESTIONS PRESENTED

1. Does a state university board of trustees have standing to seek an injunction against racial discrimination by another state agency, on behalf of its students and faculty, or in order to fulfill its own constitutional obligation to refrain from racial discrimination?

2. Did the Court of Appeals err in reaching the issue of petitioner's standing once it had affirmed the relief sought by petitioner on the basis of the unquestioned standing of another party.

PARTIES IN THE COURT BELOW

The parties in the Court of Appeals below were the State Board of Education, its members, and the State Superintendent of Education, appellants, and the Board of Trustees of Alabama State University, the Knight intervenors, and the United States, appellees.*

The proceeding in the Court of Appeals was an appeal from a preliminary injunction in a desegregation case. The desegregation case in chief involves many additional parties who took no part in the injunction proceedings or the injunction appeal. The parties in the case in chief are set forth in the footnote.**

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* The members of the Board of Trustees of Alabama State University are Richard Arrington, Jr., A.A. Chandler, Ross Dunn, Larue Harding, Andrew M. Hayden, Lillian Ann Hope, Patsy B. Parker, Joe L. Reed, James A. Smith, and Frankye Underwood. The Knight intervenors are John F. Knight, Catherine Coleman, Charles R. Anderson, Alma S. Freeman, John T. Gibson, Susan Buskey, Carl Petty, Tamara L. Knight, and Dennis C. Barnett. The members of the State Board of Education are John M. Tyson, Jr., Isabelle B. Thomason, John L. Fulmer, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., Evelyn Pratt, and Nolan Williams. The State Superintendent of Education is Wayne Teague.

** This case was filed by the United States against the State of Alabama, its public colleges and universities. and certain state

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agencies and officials. The lineup of parties has been changed by realignment and intervention. After the changes, the lineup in the district court is as follows:

The plaintiffs are the United States; the Board of Trustees of Alabama State University and its members (originally sued as defendants and later realigned as plaintiffs); the Board of Trustees of Alabama A & M University and its members (also originally sued as defendants and realigned as plaintiffs); and the Knight intervenors.

The defendants are the State of Alabama; the Governor (George Wallace); the State Superintendent of Education (Wayne Teague); the State Comptroller (Thomas Braswell); the State Finance Director (Sid McDonald); the State Board of Education and its members; the Alabama Commission on Higher Education and its members; the Alabama Public School and College Authority and its members; and the following state colleges and universities (and in some cases the members of their Boards of Trustees): University of Alabama, Auburn University, Jacksonville University, Livingston University, University of Montevallo, University of North Alabama, University of South Alabama, and Troy State University.

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No. 86-

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v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

This petition arises out of an appeal from a preliminary injunction which was sought by three of the plaintiffs (including this petitioner) against one of the defendants in a desegregation case. The Court of Appeals held that this petitioner was not entitled to seek the injunction or any other relief in this case (although the court then proceeded to affirm the injunction insofar as it was sought by the two other plaintiffs). Because the decision below may cripple the ability of the petitioner to carry out its constitutional obligations and to represent the interests of its present and prospective students and faculty in the continuing case in chief or in any other litigation, this petition should be granted even though the specific injunction which the petitioner sought is still in effect on the motion of other parties.

CITATIONS TO OPINIONS BELOW

The decision of the Court of Appeals is reported at 791 F.2d 1450 (11th Cir. 1986), and is reprinted in this Petition at 1a. The order denying rehearing is likewise reported at 791 F.2d 1450 (11th Cir. 1986), and is reprinted at 31a. The district court proceedings are unreported. Its Preliminary Injunction is reprinted at 24a; its Order amending the preliminary injunction is reprinted at 28a; and its Memorandum Opinion is reprinted at 17a.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1986. A timely petition for rehearing was denied on July 10, 1986. On September 29, 1986, Justice Powell extended the time for filing this petition to November 7, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause (Art. VI, Sec. 2 of the Constitution):

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The Equal Protection Clause (14th Amendment, Sec. 1):

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[1] After the district court granted the preliminary injunction involved in this petition, it proceeded to the merits of the case and decided the issue of liability. 628 F.Supp. 1137 (N.D. Ala. 1985), appeal pending.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Title VI, Civil Rights Act of 1964 (42 U.S.C. § 2000d):

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

The United States sued the State of Alabama, various state education agencies and officials, and all the four-year public colleges and universities in the State, including this petitioner, the Board of Trustees of Alabama State University, a historically black university in Montgomery. The essential claim was that the defendants maintain a state system of higher education which discriminates on account of race, and that they should be required to desegregate the system fully.

The Board of Trustees of Alabama State University, agreeing with the contentions of the United States, recognizing its constitutional obligation to avoid racial discrimination, and wishing to be free to challenge rather than to participate in acts of discrimination, moved to be realigned as party plaintiff rather than defendant. The motion was granted, along with a similar motion filed by the Board of Trustees of Alabama A & M University, another historically black university which had also been sued by the United States. In addition, a

group of private citizens (the Knight intervenors) intervened as plaintiffs representing a class of present and prospective students and employees of Alabama State University and the other Montgomery-area universities.

The liability phase of this case on the merits was tried in July 1985. Shortly thereafter, but before the district court's decision on the merits, one of the defendants, the State Board of Education, voted to decertify (and thus eliminate) certain education programs offered by Alabama State University. Petitioner sought a preliminary injunction on the grounds that the elimination of these programs could interfere with the district court's ability to order an effective remedy for any discrimination that it might find. The Knight intervenors sought similar relief.

The district court held a hearing and granted a preliminary injunction prohibiting the State Board of Education and the State Superintendent of Education from eliminating the programs in question.

The State Board of Education and the State Superintendent of Education appealed the preliminary injunction, both on the merits and on the ground that the Board of Trustees of Alabama State University does not have the capacity to bring a suit against its creator the State or against a state agency.

On appeal, the Court of Appeals upheld the preliminary injunction based on the motion of the Knight intervenors, whose standing was unchallenged. Despite having affirmed the injunction on the basis of one party's standing, however, the Court of Appeals also addressed the issue of petitioner's standing, and held that the Board of Trustees of Alabama State University had no standing to seek the injunction. The Court of Appeals therefore affirmed the preliminary injunction "on behalf of"

the Knight intervenors, and reversed it "on behalf of" the petitioner.[2] 15a.

In reaching its decision, the Court of Appeals relied on a line of cases in this Court and in the former Fifth Circuit which, it said, "stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator." 4a. The panel did not address the argument that the Board of Trustees of Alabama State University could raise claims either as a representative of its students and faculty, or in pursuance of the Board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land. It cited none of the cases in other circuits which have explicitly held that a school board or school district may raise such claims; it did not address, except in passing in a footnote, this Court's decision in *Board of Education v. Allen*, 392 U.S. 236 (1968); and its sole discussion of this Court's decision in *State of Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), was a footnote which made that case sound strikingly similar to the instant case.[3]

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[2] The Court of Appeals modified the injunction slightly because of the Eleventh Amendment's prohibition against suing a state. The injunction was allowed to run against the named officials but not against the State Board of Education.

[3] When the district court decided the merits of the case (liability phase), shortly after its entry of the preliminary injunction, it addressed the standing of the petitioner:

> "The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Seattle, Washington School Board—no less a creature of the State of Washinton than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amend-

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Court of Appeals' decision is in conflict with decisions of other circuit courts on the same matter, see Supreme Court Rule 17.1(a), and is in conflict with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

I. The Court of Appeals erred in holding that Petitioner had no standing to seek the preliminary injunction.

The Court of Appeals held that the Board of Trustees of Alabama State University could not request relief against the State of Alabama or any state agencies or state officials. The panel relied upon a line of cases holding that in general disputes between arms or creatures of a State do not implicate federal rights.[4] In none of those cases, however, was there an argument—or a situation calling for such an argument—that the state-created entity making the claim was doing so on behalf of persons who indisputably have federal rights, or was doing so in pursuit of its own obligation under the Supremacy Clause to conform its conduct to the federal Constitution or a federal statute.

Where such an argument *has* been made, state-created entities or members of boards of state-created entities have uniformly been allowed to sue to enforce the equal

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ment by the challenged legislative action. The dissent by Justice Powell never once suggests that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983." [628 F.Supp. at 1172.]

[4] The cases cited by the Court of Appeals were: *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907). 4a.

protection clause and similar constitutional or statutory provisions. This has been the rule in other Courts of Appeals, whose contrary decisions were not cited by the court below, and it has been the rule in this Court.

Many of the decisions came, as might be expected, in school desegregation cases. In 1956, the Eighth Circuit recognized the standing of a local school board and its members to sue to allow them to carry out their obligation to obey the Constitution:

> "[P]laintiffs are under a duty to obey the Constitution . . . It follows as a necessary corollary that they have a federal right to be free from direct and deliberate interference with the performance of the constitutionally imposd duty. The right arises by necessary implication from the imposition of the duty as clearly as though it has been specifically stated in the Constitution." [*Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 99 (8th Cir. 1956).

The Sixth Circuit has applied this reasoning explicitly to hold that a local school board has standing under the Supremacy Clause to challenge action by the State which threatens the local board's efforts to desegregate. In *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir.), *cert. denied*, 412 U.S. 932 (1974), the plaintiff school board sought to challenge on constitutional grounds a proposed transfer of a portion of its territory to an adjoining school district. The board argued. *inter alia*, that the transfer threatened to interfere with its duty to desegregate. The court found that the board had standing based upon several different grounds, among them the Supremacy Clause:

> [T]he Akron Board and its Superintendent have been commanded by action of the state board to participate in conduct leading in the direction of segregation of its school system. Such conduct would place the Board and its members and its Superintendent in the position of violating the Fourteenth Amend-

> ment to the United States Constitution. It would subject plaintiffs to being defendants in a suit to restrain conduct which they appear to abhor and which they avow to be unconstitutional. At least theoretically it might subject individual members of the Board and the Superintendent to suits for damages under the Civil Rights Act. 42 U.S.C. § 1983.

Id. at 1290.

Similar reasoning has led this Court to recognize a school board's standing to challenge state laws and policies that the board believes will interfere with its duty to support the Constitution:

> Appellees do not challenge the standing of appellants [a local school board and its members] to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing [the relevant state law provisions] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the state law]—that would be likely to bring their expulsion from office and also a reduction of state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation.

Board of Education v. Allen, 392 U.S. 236, 241 n.5 (1968) (citations omitted).

The same rule has been applied in many other cases. *See Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Board of School Directors of Milwaukee v. Wisconsin*, No. 84-C-0877, slip op. at 16-19, 22-23 (E.D. Wis. April 29, 1985); *Liddell v. Board of Education of St. Louis*, 491 F.Supp. 351 (E.D. Mo. 1981); *Black v. Missouri*, No. 77-0420-CV-W-3, slip op. at 11-12 (W.D. Mo. June 1, 1981); *Evans v. Buchanan*, 379 F.Supp. 1218, 1219 (D. Del. 1974); *Bradley v. School Board of Richmond*, 338 F.Supp. 67 (E.D. Va.) *rev'd on other grounds*, 462 F.2d 1058 (4th

Cir. 1972), *aff'd by equally divided court*, 412 U.S. 92 (1973) (per curiam).

The above principles apply fully in this case. The Supremacy Clause obligates the trustees to abide by the Constitution of the United States, and violation of that obligation subjects the Board of Trustees to suit, which is precisely what happened here. The decision of the Court of Appeals does not leave the Board of Trustees as a passive observer on the sidelines, but presumably restores it to the status of defendant, where the constitutional dilemma returns.

The lower court's holding is also contrary to this Court's recent decision in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1981), which conferred Fourteenth Amendment standing on a local school board to challenge a statewide initiative that divested local boards of their ability to use busing in order to desegregate district schools. The decision below dealt with *Seattle* in a footnote, asserting that the case could be "harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator" because the Supreme Court's decision "does not trench on a state's political prerogatives." 7a n.5. With all due respect, petitioners believe the Court of Appeals' analysis of *Seattle* was in error because this Court's opinion offers no basis for distinguishing between the situation of the Seattle school board and the Board of Alabama State University.

More recently, this Court has again decided a case in which school districts were among the plaintiffs. *Papasan v. Allain*, 106 S.Ct. 2926 (1986). The *Seattle* and *Papasan* decisions are not novel. They are in accord with the weight of authority recognizing that school boards may sue to enforce the Fourteenth Amendment rights of their students. *See, e.g., Akron Board of Education*, 490 F.2d at 1290-91; *Little Rock School District v. Pu-*

laski County School District No. 1, 584 F.Supp. 328, 352, *aff'd*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 2926 (1986); *Liddell v. Board of Education of St. Louis*, No. 72-100C(4), slip op. at 1-2 (E.D. Mo. Sept. 24, 1981); *Bradley v. School Board of Richmond*, 338 F.Supp. at 230; *Bradley v. School Board of Richmond*, No. 2253-R, slip op. at 1 (E.D. Va. Aug. 31, 1984).

The fact that the interests asserted by ASU's trustees include those of the students, faculty, and other employees of the school is not unusual. Where there is a close relationship between the plaintiffs who seek to bring an action and the class of persons whose constitutional or statutory rights are claimed to be violated, standing to sue has frequently been found. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963) (right of an organization to defend its members' constitutional rights); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of school to protect the constitutional rights of its pupils and their parents).

The presence in the case of other parties with standing who have thus far pressed similar claims—the United States and the Knight intervenors—is also no reason to bar ASU's or its individual trustees' standing, because there is no guarantee that the interests petitioners assert can or will be fully represented by the other parties.[5] Courts have recognized that school boards are often best able to represent the interests of their students. Inadequate resources, lack of familiarity with complex issues

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[5] This Court has frequently been confronted with cases in which a party, although it has standing, is not in a position to present the issues in the manner necessary for decision. This has been true in cases involving the United States, *e.g., Bob Jones University v. United States*, 461 U.S. 574 (1983), or a State, *e.g., Swarb v. Lennox*, 405 U.S. 191 (1972), or private parties. *E.g., Bailey v. Patterson*, 369 U.S. 31 (1962); *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).

involving education programs, and an inability to portray institutional interests (especially long-range, institutional characteristics which will affect prospective students) may leave students and their parents at a disadvantage and warrant representation by a school board. *See e.g., Akron Board of Education,* 490 F.2d at 1289-90. This Court has recognized that a plaintiff may represent the rights of third parties even where no obstacles prevent third party assertion of their own rights, where the interests of such individuals are "inextricably bound up with" the rights that the plaintiff wishes to pursue. *See, e.g., Singleton v. Wulff,* 428 U.S. 106, 114, 116 (1975).[6]

II. The Court of Appeals erred in reaching the question of Petitioner's standing once it had found another party who had obtained the same relief and who had unquestioned standing.

Finally, petitioner believes it was error for the Court of Appeals even to reach the issue of petitioner's standing. There were already other parties before the court who unquestionably had standing to defend the preliminary injunction. Where one party has standing, this Court has consistently held that the standing of other parties is not to be considered. *See, e.g., Secretary of the Interior v. California,* 464 U.S. 312, 319 n.3 (1984); *Watt v. Energy Action Educational Foundation,* 454 U.S. 151, 160 (1981); *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264 & n.9

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[6] Petitioners believe the arguments set forth here apply both to the claims under the Fourteenth Amendment and under Title VI. It may be, however, that assertion of a statutory claim pursuant to Title VI is appropriate even if constitutional standing is lacking. The courts have often found standing to sue under a statute while holding that the same party lacks standing to sue directly under the Constitution. *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir.), *cert. denied,* 444 U.S. 827 (1979); *Aguayo v. Richardson, supra*; *Compare Metropolitan Life Ins. Co. v. Trafficante,* 409 U.S. 205 (1972).

(1977); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976). In such circumstances a court should avoid deciding questions like this. *E.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

The decision below, far from being simply a harmless opinion, was a judgment, 29a, and it can have mischievous consequences. In all likelihood, this case will go through further proceedings and further questions about petitioner's role will probably be raised. Those questions should be decided based on the circumstances and procedural posture in which they arise, but the decision below, if left standing, may make that difficult. The result could be to decide concrete questions on the basis of the Court of Appeals' abstract rule—the antithesis of what Article III requires. In analogous circumstances, where cases have become moot on appeal, this Court has traditionally intervened by vacating judgments to avoid "spawning any legal consequences." *United States v. Munsingwear Corp.*, 340 U.S. 36, 41 (1950). See also, *e.g., Allen v. Ellisor*, 454 U.S. 807 (1981).

Petitioner believes that the decision of the court below should be reviewed by this Court and reversed, but if this Court believes that it was simply inappropriate for the Court of Appeals to reach the question of petitioner's standing, it may summarily vacate that portion of the lower court's decision, without granting plenary review.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the case set for briefing and argument. In the alternative, the writ of certiorari should be granted and the decision below should be summarily vacated in part insofar as it ruled on petitioner's standing or capacity to sue.

Respectfully submitted,

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November 1986

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors,
Appellees,

v.

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, STATE SUPERINTENDENT OF EDUCATION,
Defendants-Appellants.

June 6, 1986

Appeal from the United States District Court
for the Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d et seq. (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were

severed from the main statewide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory—that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983, or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction

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[1] In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 [102 S.Ct. 3187, 73 L.Ed.2d

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, *e.g.*, *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); and *Hunter v. City of Pittsburg*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that

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896] (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 [98 S.Ct. 2018, 56 L.Ed.2d 611] (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

"public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpretation—which would bar any suit by a creature of the state against its creator—has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the *Hunter* line—including *Safety Harbor*, *supra*—and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot*, 364 U.S. 339, 344, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound by

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[2] *Cf. City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1973); P. Bator et al., Hart and Wechsler's The Federal Courts

the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determinaiton has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra*, 307 U.S. at 441, 59 S.Ct. at 976 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *See also Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to

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and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974), for an indication of the confusion surrounding this issue.

[3] By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, —— U.S. ——, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

> make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).[4] We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

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[4] *See also Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n.3 (3rd Cir. 1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5] *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-88 n. 31, 102 S.Ct. 3203-04 n. 31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra*, 588 F.2d at 1070. But *Seattle School District* does not trench

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.[6] We continue that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir. 1985), *cert. denied sub nom. Grimmer v. Harris*, —— U.S. ——, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Con-

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on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra*, 458 U.S. at 479-82, 102 S.Ct. at 3199-3201.

[6] We note that at least five justices determined in *University of California Regents v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 2746, 57 L.Ed.2d 750 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VII rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* 438 U.S. at 281, 98 S.Ct. at 2743.

[7] *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 550 (1978).

gressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[8] Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, —— U.S. ——, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985).

The instant case does not fall under either of these first two exceptions. Alabama has not consented to suit

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[8] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), established that the amendment also proscribes suits by citizens against their own state.

under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, 105 S.Ct. at 3107 n. 17; *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra*, 105 S.Ct. at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members*, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court has indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* 105 S.Ct. at 3106 n. 14; *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was

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[9] The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the *Young* exception applies similarly in both cases.

an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. *See Monell, supra*, 436 U.S. at 694, 98 S.Ct. at 2037.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir.1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 302 (5th Cir.1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1353 (11th Cir.1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which

version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ. P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n. 7, 94 S.Ct. 1113, 1121 n. 7, 39 L.Ed.2d 435 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose*, the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.g., Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir.1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir.1965). In short we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing—particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO—

is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors

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[10] To a secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra*, 569 F.2d at 302. *See also University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services*, —— U.S. ——, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect of the Board's non-approval of most of ASU's teacher education programs is left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be non-existent.[11]

Given this finding by the lower court, which is entitled to substantial deference, *see Anderson v. City of Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court—and this Court on review—to remedy any violation of law proved

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[11] The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted—that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

in the statewide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacites. We REVERSE the district court's en v of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominantly black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimination, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.*, 769 F.2d 311 (5th Cir.1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

vs.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; etc., *et al.*,
Defendants.

[Filed Aug. 21, 1985]

MEMORANDUM OF OPINION ON MOTIONS OF ALABAMA STATE UNIVERSITY AND THE KNIGHT CLASS FOR PRELIMINARY INJUNCTION [1]

By appropriately filed motions for preliminary injunctive relief, plaintiffs Alabama State University ("ASU") and the Knight intervenors ("the Knight class") complain of the failure of the State Board of Education

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[1] This Memorandum Opinion supplements the oral findings of fact and conclusions of law dictated into the record at the end of the evidentiary hearing.

("the Board") to approve, at its August 8, 1985 meeting, any of the ASU undergraduate teacher education programs and fifteen (15) of its thirty-seven (37) graduate teacher education programs.

Current Board approval of these programs, which is a condition of continued regional and professional accreditation of ASU, expires on September 9, 1985. The Court concludes, based on the evidence adduced at a hearing on the motion, that the Board's failure to approve those ASU programs recommended by the Board's staff was retaliatorily based on the punitive consideration that ASU is involved as a plaintiff in this and another lawsuit against the board;[2] and with respect to four other programs not recommended by the staff of the Board, preliminary injunctive relief is essential to preserve the *status quo* pending a determination of the issues in the case in chief.

A brief background review is helpful to an understanding of the issues presented by the instant motions. In the summer of 1983, the United States filed this action against the State of Alabama, the state's senior colleges and universities, the Board of Education and superintendent, among others, claiming that the defendants have operated a dual system of higher education in Alabama and that its vestiges have not been eliminated. Subsequently, the predominately black schools, ASU and Alabama A & M University, were granted leave to realign themselves as plaintiffs and to assert claims against certain other defendants.

ASU has claimed that the Board's requirements for approval of various teacher education programs, particularly the faculty experience requirements for the Class A and Class AA Superintendent and General Su-

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[2] *Margaret T. Allen, et al., vs. The Alabama State Board of Education, et al.*, Civil Action Number 81-697-N (M.D. Ala., August 13, 1985).

pervisor programs, have the purpose and effect of discriminating against the traditionally black schools and black students. These issues have been severed from the main case; and they will be tried in the early part of next year.

The evience at the trial in chief establishes that prior to 1965, ASU was the only state supported, degree granting, senior institution of higher learning in Montgomery, Alabama. ASU's primary mission, as defined by the state legislature has historically involved the training of teachers. Since 1965, two additional institutions have sprung up in Montgomery: Auburn University at Montgomery ("AUM") and Troy State University in Montgomery ("TSUM"). These institutions offer the same kinds of teaching training programs as those offered by ASU.

ASU has remained virtually all-black in terms of student enrollment and its faculty is over 80% black; AUM and TSUM have predominately white student enrollments and largely white faculties. At issue in the case in chief is whether these separate programs are unnecessarily duplicative, and, if so, what relief is appropriate.

Following the filing of post-trial briefs and proposed findings, the liability issues in the main case will be taken under submission in the fall of 1985. Trial commenced on July 1, 1985; and it was completed on August 2, 1985.

Pursuant to policies adopted by the Board in 1979, Class A and Class AA superintendent programs require that at least two of the faculty members have earned doctorate degrees and three years of experience as a superintendent. Class A and Class AA general supervisor programs require similar degrees and three years of experience as a supervisor. The existing education faculty at ASU generally lacks the experience requirement;

and as stated earlier, ASU contends that the requirement has a racially discriminatory purpose and effect.

When the Board's Review Team studied ASU's education programs in 1980, its faculty lacked the specified experience. No binding recommendation was made by the Review Team in that year. Four years later, based on the lack of faculty with the specified experience, the Review Team made a binding recommendation that, *inter alia*, the Class A and Class AA Superintendent and the Class A and Class AA General Supervisor programs at ASU not be approved "until the faculty standards are met."

The faculty experience standard, based on the evidence, is of uncertain origin and intent. Its interpretation is susceptible to arbitrary results. With respect to superintendent programs, the evidence tends to indicate that the requirement disproportionately affects black faculty and institutions.

It was not shown to the Court that the failure to implement the faculty experience requirement will significantly impact on the quality of the teacher education programs offered by the various state institutions.

Under these circumstances, justice is best served by restraining compliance with the faculty experience standard pending the trial of this issue on the merits. Leaving the institutions' education programs in place insures, at the very least, that if the faculty experience requirement is subsequently found to be racially discriminatory in purpose or effect, appropriate relief can be granted by the Court.

At the August 8, 1985 meeting of the Board, the agenda included *inter alia* the approval of teacher education programs at eight senior colleges and universities in the state, including those of ASU which had been recommended for approval by the staff of the Board. When

the Board reached the ASU matters, one of its members, Dr. Victor Poole, moved that the ASU programs be approved as recommended by the staff. Board member Dr. Evelyn Pratt seconded the motion. At that point, Board member Isabel B. Thomasson indicated that she had some questions. Then Board member Dr. John L. Fulmer, retired superintendent of the public schools of Anniston, Alabama, spoke up:

> I have a comment, that is that . . . Alabama State University, who has lawsuits against this Board—we're approving teacher education programs for them. They're costing us a great deal of money and legal fees and other things and they're trying to lower the standards to get in education and college and here we are automatically approving more programs for them. And they have litigation against us now. I would like to amend the motion to say as long as their litigation is in place that we're not approving any program for them.

Dr. Fulmer's position was echoed by Mrs. Thomasson. After being told by the presiding member, Attorney John M. Tyson, Jr., that it would be improper to deny approval simply because of the lawsuits, Fulmer remained adamant:

> Here we have a university who is down our throats. They're suing us in, I think, two areas. They want to reduce teacher education standards. Our legal department is involved with it, and again we are approving all sorts of programs for them.

Although Fulmer's formal substitute motion to deny approval of all programs died for want of a second, Mrs. Thomasson then raised the question of whether there have been any improvements in ASU's education programs under the Tyson Resolution.[3]

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[3] The Tyson Resolution applies to institutions whose education students have a passing rate of less than sixty percent (60%) on

Without question, the staff of the Board had concluded that ASU had sufficiently complied with the Tyson Resolution prior to the August 8 meeting. In a document entitled, "Summary of Action Taken by Alabama State University In Response to Programs Cited Through The 'Tyson' Resolution," the staff pointed out the steps which ASU had taken to improve the performance of its education students. Staff member Dr. C.C. Baker said to the Board: "We have a report on what has been done. I have this report here today. I can share it with the Board."

The board and the superintendent were obviously not very interested in ASU's plans for and actual improvements in its programs. They pointedly ignored the report and recommendation of the staff, and postponed action on approving the recommended programs under the guise of needing additional information.

Reliance on the Tyson Resolution by the board for its failure to approve the staff-recommended ASU teacher education programs was merely a pretext for retaliation.

The board repeatedly had been made aware that the failure to approve the programs recommended by the staff would effectively terminate all of ASU's teacher education programs at the undergradute level and nearly half of its graduate programs after September 1, 1985.

The Court finds and concludes that the principal reason for the Board's failure to approve the ASU teacher education programs recommended by its staff was retaliatory. It was a rather blatant effort to punish ASU for its exercise of the fundamental right to file and prosecute a lawsuit in federal court. For reasons all too

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the Alabama Initial Teacher Certification Test. The bottom line of the Tyson Resolution requirement was summed up by Board Member Jim Allen, Jr., at the August 8 meeting: "All that Tyson calls for is for the schools to make improvements in the college of education. That's all it calls for."

obvious, the board's action, or inaction, as the case may be, cannot be allowed to stand.

The total effect of the Board's non-approval of most of ASU's teacher education programs if left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meanwhile, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be non-existent. The seeds of these dire consequences, having already been sown, may well bear deadly poisonous fruit prior to a decision on the appropriate relief in the main case, assuming that the plaintiffs prevail on the liability issues.

Consistent with this Memorandum of Opinion, a preliminary injunction shall issue.

DONE this 20th day of August, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

vs.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; etc., *et al.*,
Defendants.

[Filed Aug. 20, 1985]

PRELIMINARY INJUNCTION

Based on the accompanying Memorandum of Opinion and the findings of fact dictated into the record at the end of the evidentiary hearing, to preserve the court's jurisdiction and the *status quo* pending the court's decision on the merits, and upon the findings that realigned plaintiff Alabama State University and the class represented by the Knight intervenors will suffer irreparable injury in the absence of preliminary injunctive relief; that the defendant Alabama State Board of Education will not be prejudiced by the issuance of an injunction;

that realigned plaintiff and the intervenor class have shown a likelihood of success on the merits of their claims; and that the public interest will not be disserved by the issuance of an injunction, it is hereby

ORDERED, ADJUDGED, DECREED and DECLARED that upon the posting of a bond in the amount of One Hundred Dollars ($100.00) by Alabama State University and the Knight class, the defendants ALABAMA STATE BOARD OF EDUCATION, its members WAYNE TEAGUE, individually and as State Superintendent of Education, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this order ARE HEREBY ENJOINED and RESTRAINED

A. From failing, at its meeting of August 22, 1985, to approve, without reservation, the following teacher education programs of Alabama State University for a period of five years:

SDE Code	CERTIFICATION LEVEL	CLASS(ES)
H5	Early Childhood Certification N3, Early Childhood Education	B, A, AA
X2	Elementary Certification (1-6) Elementary Education	B, A, AA
	N-12 Certification (N-12)	
01	Art	B
A1	Music, Instrumental	B
A0	Music, Vocal/Choral	B
B6	Physical Education	B, A, AA
H8	Learning Disabled	A
X7	Mentally Retarded	B
	High School Certification (7-12)	

SDE CODE	CERTIFICATION LEVEL	CLASS(ES)
G3	Driver and Traffic Safety	B
07	French	B
23	Spanish	B
67	Language Arts	B
06	English	B
15	Mathematics	B
21	Science, General	B
28	Biology	B
29	Chemistry	B
22	Social Science	B
40	History	B
41	Political Science	B
X5	Psychology	B
42	Sociology	B
70	Business and Office Education	B
01	Art	B
B6	Physical Education	B
	Instructional Support Personnel	
66	Principal (1-6) (7-12)	A, AA
G7, M7	Supervisor, Reading (N-12)	A

B. From failing, at its meeting of August 22, 1985, to approve the following teacher education programs of Alabama State University pending further orders of the Court:

1. Class A and Class AA Superintendent.
2. Class A and Class AA General Supervisor.

C. From taking any adverse action against Alabama State University and/or its programs or activities because of the Alabama State University's participation in this case and/or *Margaret T. Allen, etc., et al. vs. The Alabama State Board of Education, et al.*, Civil Action No. 81-697-N.

The United States Marshal for the Northern District shall effect personal service at this injunction on Dr. Wayne Teague and the State Board of Education prior to Thursday, August 22, 1985.

DONE this 20th day of August, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

VS.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; etc., *et al.*,
Defendants.

[Filed Aug. 23, 1985]

ORDER AMENDING PRELIMINARY INJUNCTION

The Court, having been advised by the State Board of Education through its attorney that the Learning Disabled Class A Program at Alabama State University was previously approved by the State Board of Education, hereby relieves the State Board of Education of any duty to approve the said program at its August 22, 1985 meeting.

DONE this 23rd day of August, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

D.C. Docket No. 83-1676

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors,
Appellees,

versus

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD,* Senior District Judge.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part; and that this cause be and the same is hereby, REVERSED in part to said district Court in accordance with the opinion of this Court;

It is further ordered that each party bear own costs.

ALLGOOD, Senior District Judge, concurred and filed an opinion.

Entered: June 6, 1986

For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate: July 23, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors,
Appellees,

versus

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 6, 1986, 11 Cir. 198-, —— F.2d ——)
(July 10, 1986)

Before VANCE and JOHNSON, Circuit Judges and ALLGOOD,* Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-749

In The
Supreme Court of the United States
October Term, 1986

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY,

Petitioner,

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.*,

Respondents.

RESPONSE OF ALABAMA STATE BOARD OF EDUCATION; AND WAYNE TEAGUE, STATE SUPERINTENDENT OF EDUCATION, RESPONDENTS, TO ALABAMA STATE UNIVERSITY'S PETITION FOR WRIT OF CERTIORARI

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January, 1987

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether Alabama State University can acquire constitutional or statutory rights against its creator arising out of its duty to comply with a neutral state regulation.

B. Whether, after accepting the Court of Appeals' holding that it has no rights, Alabama State University may premise its standing on the rights of third parties already represented in the litigation.

C. Whether the Court of Appeals acted properly when it determined that Alabama State University lacked standing.

II. PARTIES IN THE COURT BELOW

The Petitioner has properly named the parties in the Court below except that Nolan Williams, formerly an elected member of the State Board of Education, has resigned. In accordance with state law, the Governor of Alabama has appointed Steadman Shealy to the State Board of Education. This information is provided to the Court in consonance with Rule 40.3, Supreme Court Rules.

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No. 86-749

In The

Supreme Court of the United States

October Term, 1986

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY,

Petitioner,

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.,*

Respondents.

RESPONSE OF ALABAMA STATE BOARD OF EDUCATION; AND WAYNE TEAGUE, STATE SUPERINTENDENT OF EDUCATION, RESPONDENTS, TO ALABAMA STATE UNIVERSITY'S PETITION FOR WRIT OF CERTIORARI

Petitioner, Alabama State University, states that the decision of the Court of Appeals "*may* cripple the ability of the petitioner to carry out its constitutional obligations and to represent the interests of its present and prospective students and faculty in the continuing case in chief . . ." Petition for Writ of Certiorari at 1 (emphasis added). Thus, petitioner asks this Court to review the decision of the Court below solely on the speculative basis

of what *might happen* as a result of the Court of Appeals' decision. Such conjecture, unsubstantiated by any facts, is not a sufficient basis upon which to seek a Petition for Writ of Certiorari. For this reason and the reasons to follow, the Petition should not be granted.

—o—

V. STATEMENT OF THE CASE

Generally, the procedural history of this case recited by the Petitioner is correct. However, certain additional facts not stated in the petitioner's statement of the case are necessary to this Court's full understanding of the issues.

The Alabama State Board of Education, respondent, is established by the Constitution of Alabama and charged with the responsibility of general supervision of the public schools in Alabama. Alabama Constitution of 1901, Amendment No. 284. Additionally, the Legislature of Alabama has made the Alabama State Board of Education responsible for regulating the certification of teachers and for the establishing of standards for the preparation of teachers by institutions of higher education. Code of Ala. (1975) §§ 16-23-2, and 16-23-14 through 16-23-16.[1]

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1. Respondent, Wayne Teague, State Superintendent of Education, is generally responsible for the enforcement of the education laws of Alabama, Code of Ala. (1975) § 16-4-4, and specifically responsible for the administration of the regulations for preparation of teachers, Code of Ala. (1975) § 16-23-16.

The preliminary injunction which is at issue in this case arose out of an ancillary proceeding which followed the liability phase of the case on the merits which was tried in July 1985. Responding to certain actions taken by the Alabama State Board of Education following the trial of the case on the merits, Alabama State University filed a motion for temporary restraining order and a verified complaint.[2] In its motion for a temporary restraining order, Alabama State University alleged that *it* would suffer injury unless the temporary restraining order issued. Likewise, in the verified complaint at paragraph 8, Alabama State University alleged that the deprivation of a major portion of its teacher education program would violate *its* rights to due process and equal protection under the Fourteenth Amendment.

It is correct that throughout the verified complaint, Alabama State University variously alleged that the action by the Alabama State Board of Education would adversely affect Alabama State University's students and faculty. However, nowhere in the motion for a temporary restraining order or in the verified complaint did Alabama State University allege that it had standing based on injury to its faculty and students. Rather, the injury asserted by Alabama State University was an injury to it in its institutional capacity.[3]

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2. These documents are included in the Appendix to this brief.

3. Thus, petitioner's, Alabama State University, assertion in its petition at 4 which makes it appear that it originally sought relief to prohibit interference with the jurisdiction of the District Court is not correct. Originally this ground for relief was asserted only by the Knight Intervenors.

In the proceedings in the District Court below, Alabama State University challenged regulations of the Alabama State Board of Education which require that some members of an institution's faculty in teacher education programs have experience in the areas which they teach. Alabama State University admitted that this experience requirement was properly adopted by the Alabama State Board of Education as part of its regulatory authority over teacher education programs. *See* paragraph 2 of verified complaint at App. 5, *ante*. With respect to this regulation, the District Court stated as follows:

> The faculty experience standard, based on the evidence, is of uncertain origin and intent. Its interpretation is susceptible to arbirtray results. With respect to superintendent programs, the evidence tends to indicate that the requirement disproportionately affects black faculty and institutions.

Opinion of District Court at 20a, Appendix to Petition for Writ of Certiorari.

Additionally, the District Court stated that no evidence was presented that failure to implement this experience requirement would adversely affect the quality of teacher education programs. On these bases, the District Court entered an injunction against the Alabama State Board of Education and the State Superintendent of Education prohibiting them from enforcing the faculty experience requirement against Alabama State University. Aside from programs affected by the experience requirement, other programs at Alabama State University were not granted renewed approval for continuation. The District Court found that this action by the Alabama State Board of Education was premised upon an impermissible

retaliatory motive occasioned by Alabama State University's filing of lawsuits against the Alabama State Board of Education.[4] Regardless of the propriety of the District Court's issuance of the injunction against the Alabama State Board of Education on the basis of the experience requirement or the retaliatory motive premises, it is clear that the District Court issued the injunction in favor of Alabama State University in its institutional capacity and not on the basis of the institution's standing derived from the rights of third parties.

VI. SUMMARY OF THE ARGUMENT

Alabama State University has no rights under the Fourteenth Amendment or Title VI, 42 U.S.C. § 2000d, *et seq.* (1964), under the facts of this case. The University cannot garner such a right on the basis that its compliance with a state regulation would require it to violate its duty under the Constitution of the United States not to discriminate on the basis of race. The state regulation at issue is neutral on its face and, thus, does not implicate the constitutional conflict implied by Alabama State University.

Alabama State University's failure to challenge the Court of Appeals' holding that it has no rights against its creator forecloses the University from premising its

4. This finding was challenged by respondents on the appeal below. The Court of Appeals did not directly address this issue, deeming motivation irrelevant to the issuance of a preliminary injunction.

standing on rights of third parties. Moreover, Alabama State University and the third parties lack any relationship supportive of the University's claimed ability to assert third party rights. The third parties whose rights the University seeks to assert are separate litigants in this lawsuit. Thus, the University cannot base its standing on these third parties' rights.

Alabama State University has consistently asserted its own, institutionally personal rights in this litigation. The interests of the University and the third party individuals are not identical. Thus, the Court of Appeals was correct in proceeding to determine the standing of Alabama State University.

VII. ARGUMENT

A. Alabama State University Has No Independent Constitutional Or Statutory Rights Against Its Creator And Cannot Acquire Such Rights Arising Out Of Its Duty To Comply With A Neutral State Regulation

The Petition for Writ of Certiorari should be denied because Alabama State University has no independent right to assert claims under the due process or equal protection clauses of the Fourteenth Amendment or Title VI, 42 U.S.C. § 2000d, *et seq.*, (1964). against the Alabama State Board of Education arising out of actions by the Alabama State Board of Education in consonance with that Board's authority over teacher education programs. The Court of Appeals held, without adopting any *per se* rule, that Alabama State University, as a creature of the

State of Alabama, has no rights under the Fourteenth Amendment or Title VI, 42 U.S.C. § 2000d, *et seq.* (1964). The Court of Appeals premised its judgment on a line of cases in this Court including *Cannon v. University of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *Coleman v. Miller,* 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. State of New Jersey,* 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); and *Hunter v. City of Pittsburg,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907). As noted by the Court of Appeals, generally these cases stand for the proposition that creatures of a state have no standing to invoke *certain* constitutional provisions in opposition to the will of their creator.

Alabama State University, petitioner, argues that the Court of Appeals overlooked Alabama State University's duty to obey the Constitution of the United States. Alabama State University claims that this duty permits it to file a lawsuit against the State, citing *Board of Education v. Allen,* 392 U.S. 236, 241 n.5, 88 S.Ct. 1923, 1925 n.5, 20 L.Ed.2d 1060, 1064 n.5 (1968). In sum, Alabama State University argues that it has a right under the Constitution and the laws of the United States to challenge actions of its creator if those actions interfere with Alabama State University's duty under the Constitution.[5]

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5. Obviously the retaliation claims of Alabama State University (even if true) do not support its right to file suit. Alabama State University has no constitutional duty to file lawsuits. Moreover, the retaliation claims against the Alabama State

(Continued on following page)

Even if Alabama State University's claims in this regard are correct, they are unavailing. The facts in this case demonstrate that Alabama State University's compliance with the regulations of the Alabama State Board of Education at issue could not put it in opposition to any duty which it has under the Constitution of the United States.

The regulations of the Board requiring *some*, not all, faculty members in teacher education programs to have experience in their teaching fields is neutral on its face. It does not require any institution of higher education to give hiring preference to any person because of race or any other impermissible factor. Even if this neutral regulation had a racially disparate result of which the Alabama State Board of Education was aware, that alone is insufficient to establish a violation of the Fourteenth Amendment. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); and *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972).

Moreover, it is extremely important to emphasize that the regulation does not require that all teacher education program faculty members hired by an institution of higher education have experience. Thus, even if Alabama State University's claim that black educators have less experi-

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(Continued from previous page)

Board of Education cannot withstand scrutiny. As is clear from the opinion of the District Court and the amendment to the preliminary injunction (see appendix to Petition for Writ of Certiorari) the Board approved some of Alabama State University's programs. Such an action hardly implies retaliation.

ence due to previous racial discrimination is correct, it does not follow that Alabama State University would be unable to hire black faculty as a consequence of following the Alabama State Board of Education's faculty experience regulation.

In sum, the facially neutral regulation of the Alabama State Board of Education concerning the faculty experience requirement cannot place Alabama State University in a position where it must choose between obeying the regulation or following its duty under the Constitution. Indeed, in light of the neutral nature of the faculty experience requirement, Alabama State University's argument about being placed in conflict with its constitutional duties makes sense only if Alabama State University lawfully could prefer the employment of blacks. Obviously such racial preferences cannot withstand scrutiny. *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

Under such circumstances, the Court of Appeals was correct in determining that under the facts of this case Alabama State University has no rights under the Fourteenth Amendment or under Title VI, 42 U.S.C. § 2000d, *et seq.* (1964). For this reason, the Petition for Writ of Certiorari should be denied.

B. Alabama State University Legitimately Cannot Premise Its Standing On The Rights Of Third Parties Who Are Already Represented In This Litigation.

Alabama State University argues that the cases relied upon by the Court of Appeals in holding that Alabama State University has no federally protected rights as

against its creator do not consider the situation where the governmental entity whose standing is challenged was asserting claims on behalf of persons who "indisputably have federal rights. . ." Petition for Writ of Certiorari at 6. From this argument, it appears that Alabama State University seeks to bootstrap its standing by claiming to assert rights on behalf of its faculty and students. This argument is unavailing for several reasons.

Consistent with the Constitution's "case or controversy" requirement in Article III, this Court has insisted that litigants have standing to challenge actions the propriety of which the litigant seeks to adjudicate.

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . .

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700, 709 (1982); *see also Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 260-61, 97 S.Ct. 555, 561, 50 L.Ed.2d 450, 461-62 (1977).

In its arguments requesting this Court to grant its Petition for Writ of Certiorari, Alabama State University appears to accept the holding of the Court of Appeals that under the facts in this case it has no rights and therefore no standing under the Fourteenth Amendment or Title VI, 42 U.S.C. § 2000d, *et seq.* (1964). The essence of the standing question in the first place is whether the

litigant has a "stake" in the case occasioned by a personally suffered actual or threatened injury. Thus Alabama State University's failure to challenge the Court of Appeals' holding that it has no rights should end the standing inquiry. Absent the assertion by Alabama State University of rights personal to it which the Alabama State Board of Education has adversely affected, the University cannot acquire standing by assertion of the rights of third parties. "Those who do not possess Art. III standing may not litigate as suitors in the Courts of the United States." *Valley Forge*, 454 U.S. at 475-76, 102 S.Ct. at 760, 70 L.Ed.2d at 711-12.

Aside from Alabama State University's lack of a personal stake in this controversy, it is equally clear that the University fails to meet the requirements for asserting third party standing. In *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), this Court dealt directly with the question of the circumstances under which a litigant may claim standing to vindicate the constitutional rights of third parties. *Singleton* stands for the proposition that the general rule of disallowing standing based on third party rights is not to be applied where the rule's underlying justifications are absent. To make this determination the Court has insisted upon investigation of two factual elements. The first element is investigation of the relationship between the litigant and the person whose rights the litigant seeks to assert. The second factual element to be investigated is the ability of the third party to assert their own rights. *Singleton*, 428 U.S. at 114-15, 96 S.Ct. at 2874-75, 49 L.Ed.2d at 833-34. Analysis of these two factual elements demonstrates that Alabama State University cannot claim standing based on the third party rights of its faculty and students.

The relationship between Alabama State University and its faculty assuredly militates against permitting Alabama State University to assert faculty rights. In the instant case, the right asserted under the Fourteenth Amendment and Title VI, 42 U.S.C. § 2000d, *et seq.*, (1964). is the right to be free of racial discrimination. Previously determined litigation evidences that Alabama State University itself has been guilty of racial discrimination with regard to its faculty. *See Craig v. Alabama State University*, 804 F.2d 682 (11th Cir. 1986); *Craig v. Alabama State Univeristy*, 451 F.Supp. 1207 (M.D. Ala. 1978), affirmed 614 F.2d 1295 (5th Cir. 1980), *cert. denied, sub nom., Dutt v. Alabama State University*, 449 U.S. 862, 101 S.Ct. 167, 66 L.Ed.2d 79 (1980). Thus, the relationship between Alabama State University and its faculty is not such that Alabama State University is as effective a proponent of the asserted right as members of the faculty. *Singleton*, 428 U.S. at 115, 96 S.Ct. at 2874, 49 L.Ed.2d at 833-34. Nor, under the circumstances, can Alabama State University legitimately be recognized as an advocate for the rights of its faculty. Accordingly, these facts weigh heavily against permitting Alabama State University to claim standing to vindicate the rights of its faculty members.

Likewise, there is no special relationship existing between Alabama State University and its students which demonstrates that Alabama State University can be an effective advocate for the rights of its students to be free of racial discrimination. This is especially true with respect to the facts of the instant case where the challenged action relates to regulatory requirements governing teacher education programs. Students have no right, con-

stitutional or otherwise, to attend a particular institution. Thus, the enjoyment of the right to be free of racial discrimination is not inextricably bound up with Alabama State University's desire to offer teacher education programs. Accordingly, Alabama State University cannot claim standing based on the third party rights of its students.

The second factual inquiry necessary to determine whether Alabama State University can premise its standing on third party rights is the ability of the third party to assert its own rights. In the instant case, justification for Alabama State University's standing based on this aspect of third party rights is wholly lacking. The Knight Intervenors represent a class of persons who are present or future students of Alabama State University and persons who were, are, or will be employees of Alabama State University. Thus, the Knight Intervenors represent a class of individuals within which is completely subsumed the category of faculty and students of Alabama State University. Therefore, the Knight Intervenors are the best representatives of Alabama State University's faculty and students. Moreover, the arguments made by Alabama State University in support of its Petition for Writ of Certiorari in this Court call into question whether Alabama State University, under any circumstances, is an appropriate representative of the rights of its faculty and students.

Apparently on the basis of some *parens patrie* notion, Alabama State University argues that it is in the best position to assert third party rights, especially of its students, because the issues in cases such as this one are often com-

plex and students have inadequate resources, lack of familiarity with the issues, and an inability to portray institutional interest. Petition for Writ of Certiorari at 10-11. As previously noted, the Knight Intervenors represent a class of persons consisting largely of faculty members and students of Alabama State University. The arguments advanced by Alabama State University in its "*parens patrie* role" totally undercut the fundamental adequacy of representation requirement of Rule 23, Federal Rules of Civil Procedure. Obviously, Alabama State University's advancement of an argument which directly undercuts the representative capacity of the very persons whom Alabama State University asserts it can represent vividly demonstrates the University's inability to advance appropriately the third party rights at issue in this litigation.

For the foregoing reasons, Alabama State University's claim of standing based on the rights of third parties lacks merit. Accordingly, Alabama State University's Petition for Writ of Certiorari should be denied.

C. The Court Of Appeals Acted Properly When It Determined That Alabama State University Lacked Standing.

Alabama State University also argues that the Court of Appeals erred in determining whether it had standing to pursue claims against the Alabama State Board of Education and State Superintendent of Education because the Court of Appeals determined that the Knight Intervenors did have standing. Principally, Alabama State University relies on *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976). In that case, this Court determined that since some of the litigants had a sufficient personal stake

"in a determination of the constitutional validity of *each* of the challenged provisions . . ." there was no need to determine whether each of the litigants met the standing requirement. *Buckley,* 424 U.S. at 12, 96 S.Ct. at 631, 46 L.Ed.2d at 683 (emphasis added). See also *Watt v. Energy Action Educational Foundation,* 454 U.S. 151, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981).

Obviously, this argument fails because the interest of Alabama State University and the interest of the Knight Intervenors are not identical. From the very beginning of this case, Alabama State University has asserted its own rights as an institution. Respondents, Alabama State Board of Education and State Superintendent of Education have called into question the validity of Alabama State University's assertion of those rights. Since the nature of the personal stake which faculty and students may have with respect to the State's enforcement of teacher education regulations is entirely different from the nature of the personal stake which an institution of higher education may have with respect to enforcement of those regulations, it was entirely appropriate and necessary for the Court of Appeals to resolve this issue. The action of the Court of Appeals presents no legitimate basis upon which this Court should exercise its discretionary authority to review the decision below.

———o———

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals with respect to the rights and standing of Alabama State University was correct. Alabama State University advances no arguments which favor granting the Petition for Writ of Certiorari. Accordingly, the Alabama State Board of Education and State Superintendent of Education respectfully request the Court to deny Alabama State University's Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Attorney for Respondents Alabama State Board of Education; and Wayne Teague, State Superintendent of Education

January 1987

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CIVIL ACTION
Plaintiff,	)	NO. CV-83-C-1676-S
VS.	)	
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	

MOTION AND NOTICE FOR TEMPORARY RESTRAINING ORDER

Realigned Plaintiff Board of Trustees for Alabama State University hereby moves this Court for a Temporary Restraining Order restraining and enjoining the defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from failing and refusing to take the necessary steps to recertify the following Education Programs at Alabama State University, pending a hearing and determination of realigned plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction: Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor.

Unless this motion is granted, realigned plaintiff Board of Trustees for Alabama State University will suffer im-

mediate and irreparable injury, loss and damage if defendants are permitted to decertify the above-enumerated programs until a hearing can be had on this motion, as more fully appears from the verified Complaint attached hereto.

DATED this 13th day of August, 1985.

Respectfully submitted,

/s/ Solomon S. Seay, Jr.

/s/ Terry G. Davis

Attorneys for Realigned Plaintiff
Board of Trustees for Alabama
State University
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Montgomery, Alabama 36106
(205) 834-2000

NOTICE OF MOTION

TO: ALL ATTORNEYS OF RECORD FOR DEFENDANTS IN THE ABOVE-STYLED CAUSE

Please take notice that on the ..... day of ....., 1985 at 9:00 o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will bring the above motion on for hearing before the Honorable U. W. Clemon, United States District Judge, at the United States Courthouse, Birmingham, Alabama.

/s/ Solomon S. Seay, Jr.

/s/ Terry G. Davis

CERTIFICATE OF COUNSEL

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, the undersigned attorney of record for Realigned Plaintiff Board of Trustees for Alabama State University, hereby certify that a copy of the above and foregoing motion was mailed to the attorneys for all of the parties on the 13th day of August, 1985.

I further hereby certify that a copy of the above and foregoing motion was hand delivered to the Office of Attorney Charles Coody, the attorney representing defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, and that I was advised by Mr. Coody's Office that he would be out of town until Thursday, August 15, 1985.

/s/ Solomon S. Seay, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
VS.	)	CIVIL ACTION NO.
	)	
THE STATE OF ALABAMA, et al.,	)	CV-83-C-1676-S
	)	
Defendants.	)	
	)	

COMPLAINT

Jurisdiction

1. This action arises under the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. §§ 1981 and 1983, and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. Jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. §§ 1331, 1343(3), and 1341(4), 2201 and 2202.

Parties

2. The parties to this action are correctly enumerated in this Court's Principal Pretrial Order dated February 19, 1985; except Livingston University and the University of Montevallo, whose Rule 41(b) motions were granted.

Allegations of Fact

2. Realigned Plaintiff Board of Trustees for Alabama State University in its statement of Amended Claims, heretofore filed in this case, alleged:

> "12. Exercising its authority under *Ala. Code*, Sec. 16-24-14 (1975), the defendant State Board has also prescribed minimum requirements for faculty members in programs for instructional support personnel. Approval of an institution's teacher education program is contingent upon meeting these requirements which include the following:
>
> > a. That they hold an earned doctorate, or the equivalent, with a major emphasis in the field of specialization in which the major workload is assigned;
> >
> > b. That they have a minimum of three years of successful experience as a practitioner in the instructional support area in which the major workload is assigned;
> >
> > c. That at least one faculty member in each instructional support area in which a program leading to certification is offered shall hold an earned doctorate with an area of specialization in that field.
>
> "13. In May 1984, a review team appointed by the defendant State Superintendent of Education recommended that no students be admitted to the following programs at ASU because faculty members in these programs did not meet some or all of the aforegoing faculty requirements:
>
> > a. The Class A and Class AA Superintendent Program: of the two faculty members in this program at ASU, both have the appropriate doctorates, but neither has three years experience as superintendent. One faculty member with an appropriate degree and three years of experience

as a superintendent is required for the Class A program; two such faculty members are required for the Class AA program.

b. The Class A and Class AA General Supervisor Program: of the two faculty members in this program at ASU, both lack the required doctoral level preparation in supervision, and both lack the three years of experience as a supervisor. One faculty member with appropriate preparation and experience is required for the Class A program; two such faculty members are required for the Class AA program.

c. The Class A and Class AA Reading Supervisor Program: of the two faculty members in this program at ASU, both have the required doctoral level preparation, but neither has three years of experience as reading supervisor. One faculty member with appropriate doctoral level preparation and three years of experience as a reading supervisor is required for the Class A program; two such faculty members are required for the Class AA program.

d. The Class A and Class AA Library Media Program: the one faculty member in this program at ASU is fully qualified, but State Board regulations require a minimum of two faculty members meeting the aforesaid requirements for the Class A program. No additional faculty member is required for the Class AA program."

3. The Amended Claims further alleged that:

"14. The State Board's requirements for faculty in programs for instructional support personnel and the recommendations of the May 1984 review team at ASU have an adverse racial impact on black students and traditionally black institutions, including ASU, and they perpetuate the vestiges of the prior *de jure* system of racial segregation at all levels of public

education in Alabama. Because of historical segregation and racial discrimination against black students and black professionals, there are disproportionately few black educators who can satisfy faculty requirements for instructional support personnel programs, namely, three years experience as a superintendent, supervisor, reading supervisor or supervisor of library media and doctoral level preparation in those specific fields of specialization."

"15. The faculty requirements for instructional support personnel programs are not necessary for the successful operation of such programs or for the successful preparation of students in those programs."

"16. The requirements for faculty in instructional support personnel programs have both the purpose and the effect of discriminating against black students, black professionals and traditionally black institutions."

4. The Amended Claims also sought, *inter alia,* preliminary and permanent injunctions restraining and enjoining the defendants from continuing to enforce the minimum faculty requirements for instructional support personnel programs.

5. On, to-wit, the 8th day of August, 1985, the defendant State Board of Education failed and refused to recertify the Class A and Class AA Superintendent Programs, the Class A and Class AA General Supervisor Programs, the Class AA Reading Supervisor Program at Alabama State University, allegedly by reason of the fact that Alabama State University failed to meet the faculty experiential requirement. The Board's action had the purpose and effect of decertifying said programs after September 9, 1985. A copy of the State Board of Education's resolution is attached hereto as Exhibit 1, and incorporated herein by reference and made a part hereof as if herein set forth in full.

6. Faculty personnel assigned to the above-named instructional support personnel programs at Alabama State University are all persons with faculty rank and tenure, and are otherwise qualified except for experiential requirements. Each is black.

7. Experiential requirements adopted by the Board, and the action of the defendant Board in decertifying the programs at Alabama State University have both the purpose and effect of discriminating against black students, black professionals and traditionally black Alabama State University.

8. Unless restrained and enjoined by this Honorable Court, the action of said Board will have the effect of depriving Alabama State University of a major portion of its Teacher Education Program, in violation of due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981 and 1983.

PRAYER FOR RELIEF

WHEREFORE, Realigned Plaintiff Board of Trustees for Alabama State University respectfully prays that this Court take cognizance of this Complaint for Temporary Restraining Order and for Preliminary Injunction, and after careful consideration of the matters and things set forth herein, enter Temporary Restraining Order and Preliminary Injunction:

(1) restraining and enjoining defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert and participation with them, from failing and refusing to recertify the Class A Superintendent,

Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor Programs at Alabama State University pending final hearing and determination of this claim;

(2) mandatorily requiring that the defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert and participation with them, recertify the Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class A Reading Supervisor Programs at Alabama State University pending final hearing and determination of the merits of this claim.

Respectfully submitted,

ADDRESS OF COUNSEL:

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732 Carter Hill Road
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/s/ TERRY G. DAVIS

ATTORNEYS FOR REALIGNED PLAINTIFF BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I hereby certify that I have read the foregoing Complaint, and know the contents thereof, and that the matters and things set forth therein are true and correct to the best of my knowledge, information and belief.

/s/ BEATRICE MORSE

SWORN TO AND SUBSCRIBED before me this the 13th day of August, 1985.

/s/ SOLOMON S. SEAY, JR.
NOTARY PUBLIC
STATE OF ALABAMA AT LARGE
MY COMMISSION EXPIRES: 2-1-89

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing COMPLAINT upon the following persons, by placing same in the United States Mail, first-class postage prepaid, on this the 13th day of August, 1985:

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Supreme Court, U.S.
FILED
JAN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
Petitioner

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT OF
EDUCATION, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENT BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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January 1987

WILSON • EPES PRINTING CO., INC. • 789-0096 • WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is premature for this court to review the denial of standing to a state university to sue its sister institutions and the state which created them where it has suffered no harm because the injunctive relief requested by the university was granted to other parties, and where the case in chief remains pending in the Court of Appeals?

2. Whether the Court of Appeals properly found that a state institution lacks standing to sue the state which created it under Title VI, the Fourteenth Amendment and Section 1983?

PARTIES

As more fully appears below, this respondent disagrees with petitioner's characterization of the case in chief as a "desegregation" case. It is more properly described as an "enhancement" case, in which two state universities and their support groups are attempting to utilize civil rights law to increase their funding and resources at the expense of the other state universities.

The petitioner has correctly named the parties to the case in chief currently pending in the Court of Appeals, but did not mention that this respondent participated actively in the injunction appeal as amicus curiae, arguing specifically that petitioner had no standing or right to make institutional claims against its creator, the State of Alabama, and its sister institutions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-749

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
Petitioner

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT OF
EDUCATION, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENT BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The petitioner has in the petition correctly described and reprinted the opinions and rulings below.

JURISDICTION

Except for its argument below concerning advisory opinions, mootness and ripeness, this respondent does not dispute the jurisdiction of this Court to act on the petition in this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This respondent does not believe that any statutes or constitutional provisions, except for Article III of the

Constitution of the United States, should be considered in connection with this petition, since it raises the standing issue prematurely.

STATEMENT OF THE CASE

This is the third attempt of the petitioner to obtain piecemeal review by this Court of issues in the case in chief below. On May 16, 1986, in No. 85-1878, the petitioner joined with others in filing a petition for writ of certiorari seeking a dissolution of stays entered in the case in chief by the Eleventh Circuit and a ruling by this Court on whether the appeal from the District Court to the Court of Appeals was premature. While the petition was pending, petitioner also participated in filing an Application, No. A-239, with Justice Powell, to dissolve the stay orders issued by the Court of Appeals. On September 30, 1986, Justice Powell denied the Application, and on October 6, the Court denied the petition for writ of certiorari.

Though the Court of Appeals held in the State Board of Education appeal from the District Court's granting of a preliminary injunction that petitioner had no standing, it nevertheless affirmed the District Court's action in granting the injunction, based on the standing of other parties (the Knight Intervenors) to the proceeding. See *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986). Thus, petitioner has suffered absolutely no injury from the ruling sought to be reviewed, and at least for the time being the issue is moot.

The question of the effect of the holding that petitioner lacks standing is currently pending before the Eleventh Circuit Court of Appeals in the case in chief. There, this respondent has contended that this petitioner and a similarly situated university were improperly realigned as plaintiffs. *See* Appellant The Board of Trustees of The University of Alabama's Opening Brief at

69-72 in *United States v. Alabama*, No. 86-7090 (*pending in* 11th Cir.).

The record of the case in chief pending in the Eleventh Circuit Court of Appeals consists of 180 volumes and 33 boxes of exhibits. It contains concrete facts necessary for the Court of Appeals to determine the impact of its prior holding that petitioner has no standing in this action. The respondents expect oral argument to be scheduled in this case in February or March, 1987.

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied because the issue of standing is not ripe for decision. If the writ were granted and the issue decided at this stage it would result essentially in an advisory opinion without benefit of concrete facts necessary for the Court to understand the full import of its decision. Further, the holding of the Court of Appeals is correct and does not conflict with applicable decisions of this Court, but is consistent with them, and can be distinguished from the holdings of other lower courts which the petitioner claims are contrary.

I. The Petition for Writ of Certiorari Is Premature.

This Court has long held that under the "case" and "controversy" limitation of Article III of the United States Constitution, it should not decide issues that are not ripe for decision. *See United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222 (1954); Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862, 922-936 (1985). This Court as a rule does not decide a question "in advance of the necessity of deciding it." *United States v. Raines*, 362 U.S. 17, 21 (1960).

The petitioner takes issue with a decision of the Court of Appeals which affirmed the preliminary injunction

sought successfully by the petitioner and others in the District Court. The Eleventh Circuit held that although the petitioner lacked the capacity to secure the injunction under either 42 U.S.C. 1983 or 42 U.S.C. 2000d (Title VI of the Civil Rights Act of 1964), the Knight Intervenors, a class of individuals aligned with the petitioner, did have standing. Granting this petition and the relief it seeks would have no immediate effect on the relief sought by the petitioner, the conduct of the parties, the rights of petitioner's students, or the duties of the respondent State Board of Education. The preliminary injunction issued by the District Court remains fully in force. As indicated above and in the petition, the decision to which the petition is directed represents only a small part of a larger case involving the rights and obligations of the State of Alabama and all of its senior-level public institutions of higher education under the Fourteenth Amendment and Title VI. The case in chief is presently on appeal to the Eleventh Circuit Court of Appeals. Briefing has been completed and the parties are awaiting oral argument. The issues raised by this petition are raised in the appeal presently before the Eleventh Circuit. To the extent that petitioner relies upon characterizations of its role in the larger litigation—such as whether it asserted the interests of its students and faculty rather than institutional interests—those arguments are more properly directed to the Eleventh Circuit which will have the benefit of the record to test their accuracy and relevance.

The petitioner quite properly is anxious about the results of that appeal. However it is not accurate to assert that the decision below will "cripple [its] . . . ability . . . to represent the interests of its present and prospective students and faculty in the continuing case in chief or any other litigation . . ." (Petition, page 1).[1]

[1] The only remaining duty of petitioner in the case in chief is to present oral argument. This respondent is not aware of any "other litigation" underway or anticipated by petitioner.

The time to seek the review in this Court of the Eleventh Circuit's decision on the case in chief is after such a decision has been rendered.

II. This Court Should Not Give the Petitioner an "Advisory Opinion" On Standing Where No Concrete Factual Record On the Issue Is Before It.

Since President Washington asked the Justices of this Court a number of abstract questions regarding United States neutrality in a war between France and England, this Court has refused to issue advisory opinions. *See* D. Currie, *Federal Jurisdiction* 9 (1981). Although advisory opinions are traditionally requested by the legislative or executive branches of government, here the petitioner, by admitting that the injunctive relief it requested remains in effect in the Court below, is asking this Court for an advisory ruling. The request should be denied for all of the policy reasons supporting the rule against advisory opinions. As Justice Reed said many years ago, "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

III. The Petition Mischaracterizes the Decision of the Court of Appeals and Misstates the Nature of the Petitioner's Role in the Proceedings Below.

The petitioner is perhaps too distraught at the implications of the decision of the Court of Appeals. Although that court found that petitioner lacked the capacity to assert a claim under either 42 U.S.C. 1983, Title VI, or the Fourteenth Amendment, the decision below did nothing to diminish the protections that these provisions extend to petitioner's students and faculty. Despite respondents' arguments to the contrary, the Court of Appeals did not hold that petitioner was completely without the protection

of the law, or that under different factual circumstances and under different legal theories the petitioner as an institution might avail itself of some form of judicial protection:

> We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

United States v. Alabama, 791 F.2d 1450, 1454 (11th Cir., 1986).

The petition also asserts that the decision of the Court of Appeals did not "address the argument that [the Board of ASU] could raise claims either as a representative of its students and faculty or in pursuance of the Board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land." (Petition, page 5.) As is abundantly clear in the record of the case in chief, the petitioner's interest in this litigation is in its own status as an institution. It pursued its own institutional objectives of increased funding, additional programs, facilities enhancement, and the acquisition of neighboring campuses (specifically, petitioner seeks merger of and control over Auburn University in Montgomery and Troy State University in Montgomery). It did not serve as a representative vehicle to assert the individual rights of its students and faculty. That this was clear not only to the Court of Appeals, but also to the District Court is evident by its certification of the class of Knight Intervenors. The record simply does not permit petitioner to disguise its attempt at institutional hegemony with the camouflage of being nothing more than a surrogate for the individual rights of its students.

Nor can petitioner's plea that Judge Johnson's opinion in the Court of Appeals will make it impossible

for its Board members to be true to their oaths and to the Constitution be taken as anything other than disingenuous. There are two principal obstacles to this argument. First, petitioner must show that it not only has the ability to sue under 42 U.S.C. 1983 and Title VI but also that it is somehow legally obligated to do so. The necessary premise of this argument is that by failing to bring suit against the State and the other public institutions, it would somehow incur liability under these same statutes. Unless it intends to admit to participation in an illegal conspiracy with the State there is nothing in either 42 U.S.C. 1983 or Title VI which would create liability on the part of petitioner for the conduct of another party.

The second difficulty with petitioner's argument is found in the pages of its own history. The Court of Appeals is not the source of petitioner's difficulty in complying with the Constitution. Petitioner remains the only public institution of higher education in Alabama which has been found guilty of class-wide race discrimination against its faculty. In *Craig v. Alabama State University*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd* 614 F.2d 1295 (5th Cir. 1980), petitioner was found liable for deliberate and systemic race discrimination against white faculty. Recently the Eleventh Circuit determined that the petitioner continues to suffer the effects of its own discriminatory practices:

> Judge Johnson's earlier decision in *Craig* establishes that ASU engaged in purposeful discrimination in all phases of employment practices resulting in an overwhelming imbalance in the racial composition of its workforce, *see* 451 F. Supp. at 1208, that persists virtually unchanged.

Craig v. Alabama State University, —— F.2d ——, slip op. at 491 (11th Cir. Nov. 18, 1986). With such a history (and a present) petitioner can hardly lay at the doorstep of the Court of Appeals any blame for its in-

ability to comply with the most basic requirements of the civil rights laws. The denial to petitioner of the right to bring suit against other state agencies has absolutely no effect on its ability to begin to recognize its obligations not to discriminate against its own faculty.

There is a further implication that needs to be addressed in petitioner's assertion of the factual bases for its petition. The petitioner presumes that its institutional identity is inseparable from the identity (and hence the civil rights) of black students in Alabama. This Court should be aware that the campuses of The University of Alabama System [2] enroll more black students than any other institution in the state, including petitioner and Alabama A&M, and that there are significantly more black students collectively attending universities operated by respondents in the State of Alabama than collectively attended the two predominantly black universities. *See* Alabama A&M Exhibits 203-234 (in case in chief) summarized on table *reprinted at* Appendix 1a. Moreover, "as a corporation" the petitioner "has no racial identity and cannot be the direct target" of "alleged discrimination." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977).

IV. The Decision of the Court of Appeals Finding That Petitioner Has No Standing under Title VI, the Fourteenth Amendment and Section 1983 Is Correct.

More than a century ago in the case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall stated that "the framers

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[2] The University of Alabama System, which is operated by this respondent, is composed of three campuses, The University of Alabama, located in Tuscaloosa, Alabama, frequently referred to as UA; the University of Alabama at Birmingham, frequently called UAB; and the University of Alabama in Huntsville, also known as UAH.

of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government . . ." 17 U.S. at 629. And from that date to this, it has been clear that "[p]ublic entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state." *Randolph County v. Alabama Power Company*, 784 F.2d 1067, 1072 (11th Cir. 1986), *quoting from City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 154-55 (5th Cir. 1976). *See also, City of Trenton v. New Jersey*, 262 U.S. 182 (1923) and *Appling County v. Municipal Electric Authority*, 621 F.2d 1301 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980). This reasoning is buttressed by this Court's recent statements that a corporation "has no racial identity," and thus cannot be a legal target of discrimination, and in the ordinary case, has no standing to assert the rights of third persons. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

It also follows that state entities such as petitioner have no cognizable rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, since Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment" of the United States Constitution. *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978).

This fundamental precept of constitutional law is based on sound principles of public policy and federalism. Untold confusion and expense to state citizens would result if the multitude of public institutions and agencies created by the states were allowed indiscriminantly to sue the state or other state agencies in federal court for

alleged constitutional or statutory violations of one kind or another or merely to obtain financial leverage over the state or their sister institutions. This case is a good example. It has caused a near gridlock in higher education in Alabama, resulting in large part from the allowance of two state institutions to realign themselves as plaintiffs and to sue the state and the remaining public institutions of higher education in Alabama.

The cases cited by the petitioner do not support its position in this case. In those cases where local school districts have been permitted to sue the state or state agencies, there are clear distinctions in the facts that make those holdings inapplicable here. There is a group of cases in which a state statute or current state action required a school board to take an action that conflicted with its constitutional or statutory duty or duty of its individual members.[3] In another line of cases, the local school board was asserting the constitutional rights of its students under circumstances deemed to satisfy the prudential "standing" requirements.[4]

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[3] For example, in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) the state of Washington had adopted a statute which prohibited school boards from assigning pupils to schools except those closest to their homes. This state action, if allowed, would have prevented the school board from fulfilling its constitutional duty to desegregate Washington schools. Similarly, in *Board of Education v. Allen*, 392 U.S. 236 (1968), a state law which required school boards to loan textbooks to private schools placed the school board members in the dilemma of breaking the state law or complying with a law they felt was unconstitutional. A similar case was *Evans v. Buchanan*, 379 F.Supp. 1218 (D. Del. 1974) where a Delaware law attempted to limit school attendance to city limits.

[4] In *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974), a local board of education was held to have standing to sue the state board of education on behalf of its students to prevent transfer of a small area in its district to another district. Similar cases are *Bradley v. School Board*, 338 F. Supp. 67, 230 (E.D. Va. 1972), *rev'd on*

Here, there is no state statute or action which has required petitioner to take any unconstitutional or illegal action.

Further, the record in the case in chief pending below demonstrates that petitioner is litigating this case on behalf of its own institutional interests and not on behalf of others. Assuming, however, it does attempt to assert the rights of its students or faculty in this action, it is clear that it does not have standing to do so under traditional standing analysis. *See Singleton v. Wulff*, 428 U.S. 106 (1976) *and School District v. Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978).[5] In the latter case, the

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other grounds, 462 F.2d 1058 (4th Cir. 1972) *aff'd by equally divided court, sub nom. School Board v. State Board of Education*, 412 U.S. 92 (1973) and *Little Rock School District v. Pulaski Co. Special School District No. 1*, 584 F. Supp. 328, 352 (E.D. Ark. 1984). The case of *Brewer v. Hoxie*, 238 F.2d 91 (8th Cir. 1956) relied on by petitioner in its brief, was a suit by a school district not against a state or governmental entity, but against private organizations such as the White Citizens Council of Arkansas, to prevent them from interfering with the school district's desegregation of schools in the district. Likewise, petitioner's reliance on *Papasan v. Allain*, 106 S. Ct. 2932 (1986) is misplaced, since no school district was a plaintiff in that case, only "local school officials and school children" who were impacted by an alleged school funding disparity. 106 S. Ct. at 2939. Here, the petitioner is a public corporate state entity. *See* Ala. Code § 16-50-21 (1975).

[5] This respondent has elected not to engage in extended briefing of the standing issue herein, in an effort to keep this brief in opposition to a reasonable length, and because it presumably would be given the opportunity to brief this issue at length, if the petition were granted. Suffice it to say that the important policy considerations which underlie the standing doctrine, are applicable here to support the denial of standing to petitioner. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983). Leading cases of this Court on this issue, such as *Allen v. Wright*, 468 U.S. 737 (1984) and *Warth v. Seldin*, 422 U.S. 490 (1974) are fully analyzed in Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862 (1985).

court held a school district did not have standing to assert the rights of its students in a desegreagtion case because of the potential for a conflict of interest between the respective positions of the school district and its students. It was noted that the inquiry about discrimination necessarily began with the students' own district. 460 F. Supp. at 442. The same is true in the instant case. *See Craig v. Alabama State University*, 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (11th Cir. 1980). *See also Bender v. Williamsport Area School District*, 106 S.Ct. 1326 (1986).

As a creature of the State, under the decisions of this Court, petitioner has only such rights as the State confers upon it. Apart from the State, it has no independent right to existence or standing in federal courts to sue the State and, in its wisdom, the State may close it or merge it into other institutions. This Court, in its recent decisions involving higher education, has shown increasing reluctance to allow federal courts "to trench on the prerogatives of state and local educational institutions. . . ." *Regents of the University of Michigan v. Ewing*, 106 S. Ct. 507, 514 (1985). Indeed, the structure of higher education in a state, including the role, scope, and creation or abolition of individual institutions, is particularly a state function, often delegated to state educational officials. As long as individual student, faculty, and staff constitutional and federal statutory rights are not infringed, this Court has indicated that federal courts should not involve themselves in state educational affairs—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978). This principle is a recognition of the fact that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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January 1987

APPENDIX

HEGIS 1984 FALL ENROLLMENT

Trial Ex. No.	School	Black	White	Total
A&M 205	A&M	3,089	249	4,109
A&M 208	AU	586	17,310	18,888
A&M 209	AUM	827	4,195	5,084
A&M 206	ASU	3,694	17	3,786
A&M 210	JSU	1,070	5,231	6,564
A&M 211	LU	523	968	1,500
A&M 213	TSU	868	3,392	4,344
A&M 216	TSUM	502	1,516	2,096
A&M 218	UA	1,392	13,642	15,626
A&M 219	UAB	2,417	10,757	13,517
A&M 234	UAH	319	5,264	5,863
A&M 212	UM	257	2,446	2,782
A&M 220	UNA	433	4,714	5,197
A&M 203	U of SA	977	7,731	9,342
A&M 207	ASC	82	1,122	1,220
	Blacks at PBI's	6,783	39.82%	
	Blacks at PWI's	10,253	60.18%	
	Total Blacks	17,036		

Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-749

In The
Supreme Court of the United States
October Term, 1986

BOARD OF TRUSTEES OF
ALABAMA STATE UNIVERSITY,

Petitioner,

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.,*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT AUBURN UNIVERSITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Petition for Writ of Certiorari moot?

2. Did the court of appeals correctly hold that a state university has no rights, and therefore, no standing, pursuant to the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*?

3. May the petitioner assert a basis for standing on appeal that was not asserted at trial?

4. Does the petitioner have standing under the *jus tertii* doctrine to raise claims on behalf of its students and faculty?

PARTIES

The petitioner is Alabama State University ("ASU"). The other appellees in the court of appeals, the Knight-Intervenors and the United States, have not filed a Petition for Writ of Certiorari from the court of appeals' decision. The other plaintiff in the district court, Alabama A&M University ("A&M"), was denominated an amicus curiae in the court of appeals.

The Alabama State Board of Education ("ASBE") and Wayne Teague, State Superintendent of Education, were the defendants below to which the petitioner's request for an injunction was directed. Auburn University and its Board of Trustees ("Auburn"), and other defendants in the case in chief, participated to a lesser degree in the proceedings on ASU's request for an injunction and the subsequent appeal.[1]

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[1]The defendants below included the other public institutions of higher education in Alabama: The University of Alabama, Jacksonville State University, the University of North Alabama, Troy State University, the University of South Alabama, Livingston University and the University of Montevallo; the State of Alabama, its Governor, the Alabama Public School and College Authority and the Alabama Commission on Higher Education.

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Case or Controversy Requirement (ART. III, Sec. 2, Clause 1 of the Constitution):

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

ASU's Petition challenges a portion of the Eleventh Circuit's decision in Appeal No. 85-7582, reported at 791 F.2d 1450 (11th Cir. 1986). Understanding of that appeal requires review of the involved procedural history of the action from which it arose.

This action was initiated by the United States on July 11, 1983. The Complaint alleged that, based upon an investigation of higher education in Alabama, the United States Department of Education had found that the State of Alabama was in violation of Title VI of the Civil Rights Act of 1964 because of an alleged failure to eliminate the vestiges of a former racially dual system of higher education.[2]

ASU, a predominantly black institution which had been denominated a defendant in the United States' Complaint, moved to be realigned as plaintiff and to be al-

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[2]Specifically, the Complaint alleges that prior to 1953, the State of Alabama established and maintained a racially dual system of public higher education and that since 1953 the defendants have perpetuated the racially dual system of higher education by discrimination in student admissions, appointment of college and university governing boards, faculty hiring and assignment and allocation of the State's resources for higher education. The Complaint alleges that the enrollment, faculty and staff and governing boards of each of the institutions of higher education are still identifiable by race and that in Montgomery, Alabama and Huntsville, Alabama, the existence of Auburn University in Montgomery ("AUM") and the University of Alabama at Huntsville ("UAH"), in close proximity to ASU and A&M, respectively, impedes the ability of those traditionally black institutions to desegregate. Finally, the Complaint alleges that the State has discriminated in favor of Auburn and against A&M by selecting Auburn, and not A&M, to be the recipient of the bulk of the State's share of federal financial assistance for agricultural research and instruction.

lowed to assert claims against the other defendants on the grounds that it was "asserting a right to relief similar to that sought by plaintiff," and that it, "through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University."[3] The purpose of ASU's realignment, according to a resolution of the ASU Board of Trustees incorporated by reference in its Motion to Realign, was to maintain "the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area. . . ." The relief sought by ASU was the merger of AUM into ASU.[4]

Subsequent to the realignment of ASU,[5] the district court allowed the intervention of the Knight-Intervenors, a class represented by students, alumni, faculty and administrators of ASU and certified as consisting of graduates of ASU and black citizens of Alabama who are eligible for employment by or who attend or may attend public institutions of higher education in the Montgomery, Ala-

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[3]As discussed below at pp. 13-15, ASU has in fact acted to preserve its racial identity, at the expense of its desegregation. Such action was taken by the administration and trustees of ASU, and was not compelled by the State of any other defendant.

[4]AUM, created in 1967, has never been racially restricted in any respect. The creation of AUM was sanctioned in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam*, 393 U.S. 400 (1969), when this Court affirmed a three-judge court's rejection of the claims of a group of plaintiffs affiliated with ASU that the creation and operation of AUM would impede the desegregation of ASU.

[5]A&M also moved to realign itself as a plaintiff in order to assert claims under the Fourteenth Amendment and Title VI on the grounds that the "racially dual system of public higher education . . . has discriminated against and damaged Alabama A&M, a traditionally black institution of higher education. . . ."

bama area. The Knight-Intervenors' claims were identical to those of ASU and sought the merger of AUM into ASU.

There was no claim under the Pre-Trial Order, nor any evidence at trial, that any of the defendant institutions of higher education had denied admission to any student on the basis of race since 1967.[6]

Prior to the trial, ASU amended its claims; then, by a verified complaint filed with its Motion and Notice for Temporary Restraining Order, alleged that application of certain ASBE requirements to ASU would "have the effect of depriving Alabama State University of a major portion of its Teacher Education Program, in violation of due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981 and 1983." ASBE faculty experience requirements, which mandate that some faculty members in an institution's education programs have practical experience in areas in which they teach, were alleged to have an adverse impact on blacks and on black institutions.[7] Subsequent to the conclusion of the trial on the merits but before the trial court rendered its decision, the ASBE voted not to re-certify certain undergraduate and graduate teacher education programs at ASU. On motion

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[6]The University of South Alabama, like AUM, had never been racially restricted since its creation in 1963.

[7]The adverse impact alleged was *not* that the experience requirements precluded black students from attending predominantly white colleges, but that predominantly black colleges would have to hire additional non-black faculty to satisfy the requirements. The claim was thus related to alleged racial discrimination, but not to segregation in higher education.

by ASU and the Knight-Intervenors,[8] the district court enjoined the ASBE to maintain the status quo pending resolution of the issues raised by the United States, the realigned plaintiffs and the Knight-Intervenors in the trial on the merits. The ASBE appealed the injunction to the United States Court of Appeals for the Eleventh Circuit, in Appeal No. 85-7582.

On December 9, 1985, the district court entered a 99-page order and opinion that held that vestiges of segregation did exist in Alabama's colleges, identified the vestiges and ordered that the Governor, the Alabama Public School and College Authority ("APSCA") and the Alabama Commission on Higher Education ("ACHE") submit a plan to eliminate each vestige.

Auburn and the University of Alabama appealed the district court's December order on February 5, 1986, in Appeal No. 86-7090. On February 7, 1986, Auburn moved in the district court for a stay of further proceedings in the district court, and upon the failure of the district court to act on the motion, motions for a stay were filed in the court of appeals on February 13, 1986. The court of appeals issued orders staying proceedings in the district court on February 14, 1986, the date scheduled for the submission of a plan in accordance with the district court's decision. ASU, A&M and the Knight-Intervenors filed motions in the court of appeals to dissolve the stay and to dismiss the appeals and, upon the denial by the court of appeals of these motions, petitioned for a Writ of Cer-

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[8]Contrary to ASU's assertion (Petition, pp. i, 1), the United States did not move for such temporary injunctive relief. *See* 791 F.2d 1450, 1454 (11th Cir. 1986).

tiorari in this Court (Case No. 85-1878) seeking the same relief. Such petitions were denied.

During the pendency of Appeal No. 86-7090 from the district court's December 9, 1986, order and opinion, the court of appeals held oral argument and entered its opinion in Appeal No. 85-7582 from the district court's order enjoining the ASBE from failing to certify ASU's teacher education programs. The court of appeals affirmed the injunction as to the Knight-Intervenors[9] to maintain the status quo, but it reversed the injunctive order as to ASU's claims, on the grounds that ASU had no substantive rights, and therefore no standing, under the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Rehearing *en banc* was denied, 796 F.2d 1478 (11th Cir. 1986).

It is the court of appeals' decision that a state university has no substantive rights to equal protection or under Title VI that is now before this Court.

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SUMMARY OF ARGUMENT

The petitioners' request for Writ of Certiorari should be denied because: (1) the Petition for Writ of Certiorari is moot; (2) the court of appeals was correct in holding that a state university such as ASU does not have rights under the Equal Protection Clause of the Fourteenth Amendment or under Title VI of the Civil Rights Act of 1964, and therefore had no standing to protect non-

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[9]The court of appeals noted that the Knight-Intervenors' standing was "unchallenged" on that appeal. *See* 791 F.2d 1450, 1457 (11th Cir. 1986).

existent rights; (3) ASU's claims in the district court were not based upon the constitutional rights of its students and faculty but upon its own supposed rights as an institution, and ASU may not assert a new basis for its standing for the first time on appeal; and (4) ASU does not have standing to assert claims on behalf of its students and faculty.

———o———

ARGUMENT

I. The Petition For Writ Of Certiorari Is Moot.

ASU urges this Court to engage in the purely academic exercise of vacating the court of appeals' judgment as to ASU's standing for no reason other than that "further questions about petitioner's role will probably be raised" in the court below (*see* Petition, p. 12). ASU admits that whatever action this Court takes on its Petition will have absolutely no effect on the result reached by the court of appeals with respect to the viability of the injunction ordered by the district court, and ASU does not challenge the issue that the court of appeals decided, whether ASU has rights under the Equal Protection Clause or Title VI. ASU's Petition is therefore moot. *Cf. Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983) (action taken by third party which deprives Court of ability to redress claim renders claim moot).

ASU's argument for the need to reverse the court of appeals is based upon the "mischievous consequences" which ASU anticipates if the panel which is to decide Appeal No. 86-7090 follows the holding that ASU lacks institutional rights (*see* Petition, p. 12). Yet Appeal No.

86-7090 has been briefed and awaits impending oral argument, while ASBE remains subject to the injunction affirmed as to the Knight-Intervenors. ASU has had a full opportunity to present its argument in support of its claims in Appeal No. 86-7090, and the court of appeals may still consider that argument.

As a practical matter, Appeal No. 86-7090 is likely to be decided after careful consideration of the logic and precedential value of the opinion in Appeal No. 85-7582; but until ASU is injured by legal error arising from that opinion, there is no basis for certiorari. Moreover, a Writ of Certiorari as to the second question raised by ASU's Petition (whether the court of appeals should have reached ASU's standing) would not prevent the panel in Appeal No. 86-7090 from applying the same reasoned analysis as did Judges Vance, Johnson, and Allgood in denying ASU's institutional rights claims.

Federal courts lack jurisdiction to decide cases that do not satisfy the "case or controversy" requirement of Article III because of mootness. *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Concerns over future controversies do not keep alive a case which is moot because of the resolution of the present controversy. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). If ASU has a basis for *jus tertii* standing in some future action, nothing in the court of appeals' decision precludes it from taking such a position.[10] The court of appeals' decision should not be

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[10]ASU's claims relative to AUM are distinct from its claims relative to the ASBE experience requirements. ASU has not, however, in the appeal of the trial court's final order, attempted to explain what interest its students and factulty have with reference to its claims relative to AUM. Its entire argument in this regard is focused on itself as an institution.

vacated and the Petition for Writ of Certiorari should be denied.

II. A State University Has No Rights Under The Equal Protection Clause Or Title VI.

ASU's Petition does not challenge the significant substantive holding of the Court of Appeals as to ASU. The issue as to ASU in No. 85-7582 was whether ASU, as a state institution, had substantive rights, and therefore standing pursuant to the Equal Protection Clause or Title VI. The Court of Appeals reversed as to ASU's claims, holding "ASU . . . has no standing to sue or seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment." 791 F.2d at 1456, and held further, "Nothing in Title VI or its legislative history suggests the Congress conceived of a state instrumentality as a 'person' with rights under this statute." 791 F.2d at 1456.

The court of appeals squarely considered ASU's claims to institutional rights under the Equal Protection Clause and Title VI, and correctly rejected them.[11] That holding, which ASU fails to challenge directly in its Petition, is law of the case and mandates denial of ASU's Petition.

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[11]The cases cited in ASU's Petition do not stand for the broad proposition that a court should *never* decide any standing issue as long as at least one party has standing to assert identical claims. Rather, in these cases, the Court merely declined to perform an analysis of a party's standing where that of another party was established, thus insuring that the Court had jurisdiction of the issues presented to it. This does not mean that a decision of a court of appeals should be vacated merely because its decision on the petitioner's standing did not result in a complete reversal of the district court.

III. ASU May Not Assert Standing To Raise Claims On Behalf Of Its Students And Faculty For The First Time On Appeal.

" '[T]he presumption . . . is that the court below was without jurisdiction' unless 'the contrary apears affirmatively from the record.' " *Bender v. Williamsport Area School District,* 475 U.S. —, 89 L.Ed.2d 501, 514, 106 S. Ct. — (1986) (*quoting King Bridge Co. v. Otoe County,* 120 U.S. 225, 226 (1887)). A party's standing, therefore, "must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively . . . ." *Thomas v. Board of Trustees,* 195 U.S. 207, 210 (1904); *accord Warth v. Seldin,* 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). ASU's failure to assert the interests of its students or faculty in the district court precludes its claim of *jus tertii* standing on appeal. *See Bender, supra,* 89 L.Ed.2d at 516.

ASU first suggested that it sought standing to assert the rights of its students and faculty in its petition for rehearing in the court of appeals. There is nothing in the record to indicate that the injury alleged by ASU in this litigation was anything other than institutional in nature, and the remedy ASU seeks is the advancement of its institutional interests.[12]

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[12]ASU's interest as an institution in this case is "not necessarily parallel to the interest" of its students and faculty. *See*

(Continued on following page)

ASU's assertion that the court of appeals erred in holding that it had no standing is based entirely upon ASU's current contention that it is asserting the rights of its students and faculty and, therefore, has standing, not because of any Fourteenth Amendment rights of ASU as an institution but because of the rights of third parties who do have rights under the Fourteenth Amendment and Title VI. This argument fails because ASU's pleadings and evidence throughout this litigation make clear that its claims are based upon injuries to ASU as an institution, not injuries to its students or faculty. Exhibit 1 to ASU's Motion for Realignment, for example, clearly acknowledges that ASU's interest in this litigation is the preservation of its own "seniority"; *see* pp. A-5, A-6. When Auburn challenged ASU's standing in the district court, instead of arguing that it sought to represent the constitutional rights of its students and faculty, ASU argued that it, as an institution, had constitutional rights because of its independence from control by the State. In the trial on the merits, ASU's evidence focused on the alleged advantages of other institutions in the Montgomery area and their "competing" with ASU for students. *See U.S. v. State of Alabama*, 628 F. Supp. 1137, 1170 (N.D. Ala. 1985).[13]

(Continued from previous page)

Bender v. Williamsport Area School District, 475 U.S. —, 89 L.Ed.2d 501, 515 n.9, 106 S. Ct. — (1986). Indeed, in the case at bar, the interest ASU asserts is *in conflict* with the constitutional rights of its students and faculty. *See* pp. 13-15, *infra*.

[13]ASU does not see the irony in its claim that competition by predominantly white and predominantly black institutions for students of all races is a form of "discrimination" against ASU. The evil of a racially dual system was precisely that institutions were not permitted to compete for all students.

The proceedings on ASU's request for injunctive relief out of which the court of appeals' decision arose also clearly illustrate that the interests asserted by ASU are institutional. The trial court found that the accreditation requirement attacked by ASU "disproportionately affects black faculty[14] and institutions," and that the "Board's failure to approve ASU teacher education programs . . . was a rather blatant effort to punish ASU for its exercise of the fundamental right to file and prosecute a lawsuit. . . ." The irreparable harm that the trial court found to support its injunction was that the "attractiveness of ASU as an unaccredited institution . . . will be non-existent."[15]

Auburn has consistently disputed that anyone (the United States, ASU, or the Knight-Intervenors) has a constitutional right to the relief sought for ASU. If, as the court of appeals held, neither the Equal Protection Clause nor Title VI created institutional rights for ASU, ASU lacks standing to raise those non-existent rights. Further, ASU cannot "bootstrap" itself into standing by retroactively arguing that it has standing to raise the interest of its students and faculty to assert the same, non-existent, institutional rights of ASU.

Whether ASU was a proper representative of its students or faculty as to the relief ASU seeks was a question presented neither in the district court nor in the court

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[14]The Knight-Intervenors represent black ASU faculty in this proceeding.

[15]The trial court did not find that any black person's employment would be terminated or that any black student would be deprived of an education because of the ASBE requirement or by its action in refusing to certify the ASU programs. (See appendix to Petition, pp. 17a-23a.)

of appeals.[16] Nor is there anything in the record to indicate that the evidence presented by ASU showed that it was being forced, as a consequence of obeying state law, to perpetuate segregation of its student body or faculty.[17]

IV. ASU Does Not Have Standing To Assert The Interests Of Its Students And Faculty.

Many cases have held that a local school board may have standing to assert the rights of its students and faculty because the school board members have been placed in a position of either violating state law or the constitutional rights of their students or faculty; *see Board of Education v. Allen ("Allen")*, 392 U.S. 236, 241 n.5 (1968); and because of the "close relationship" between the plaintiffs who seek to bring an action and the class of persons whose constitutional rights are claimed to be violated. *See Akron Board of Education v. State Board of Education ("Akron")*, 490 F.2d 1285, 1289 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974); *see also, Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) *("Hoxie")*. *Allen, Arkon, Hoxie* and their progeny[18] do

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[16]Auburn has also contested the standing of the Knight-Intervenors in Appeal No. 86-7090 as to the district court's decision on the merits. See n.19, *infra*.

[17]ASU's unlawful discrimination against white faculty, discussed at page 15 below, was done by ASU's administration, rather than the state or any state agency other than ASU. See *Craig v. Alabama State University*, 451 F. Supp. 1207, 1212-13 (M.D. Ala. 1978), *aff'd*, 614 F.2d 1295 (5th Cir.), *cert. denied, sub nom., Dutt v. Alabama State University*, 449 U.S. 862 (1980); *Craig v. Alabama State University*, 804 F.2d 682, 684 (11th Cir. 1986).

[18]Although the standing of the plaintiff was not discussed in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), that case presented a factual situation almost identical

(Continued on following page)

not, however, support the standing of ASU to assert the rights of its students and faculty in this case.

First, unlike the plaintiffs in *Allen*, *Hoxie* and *Akron*, ASU is not in the position of resisting a state law which it alleges will force it to take action that will *increase* segregation.

ASU, a university, differs significantly from the plaintiffs in *Allen*, *Hoxie* and *Akron* in the basis for its resistance to state authority. The members of its board of trustees are not claiming that actions of the state have put them in the position of either violating state law or the constitutional rights of their students. ASU alleged in its Motion To Realign that it has done everything in its power to desegregate but that it is being victimized by the actions of other agencies of the state. *See* p. A-2.[19] Where this conflict between adherence

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to that of *Board of Education v. Allen*, 392 U.S. 236 (1968). Similarly, in *Papasan v. Allain*, 478 U.S. —, 92 L.Ed.2d 209, 106 S. Ct. 2932 (1986), the standing of local school officials to assert the interests of school children under their charge was neither challenged by the respondents or addressed by the Court, apparently because the school children themselves were parties. *See Papasan*, 92 L.Ed.2d at 224-225. ASU's reliance on both cases is misplaced.

[19]Quite to the contrary, ASU resisted ASBE experience requirements for faculty, because most persons who satisfy those experience requirements are white. Hiring of experienced white persons would have furthered desegregation of ASU's disproportionately black faculty.

to state law and constitutional duty is absent, so is the basis for standing enunciated in *Allen* and its progeny. *Compare Allen, supra,* and *Akron, supra,* with *School District of Kansas City v. State of Missouri,* 460 F. Supp. 421, 440 (W.D. Mo. 1978).

Second, the class represented by the Knight-Intervenors in this case includes the students and faculty of ASU. Although the interests asserted by the Knight-Intervenors are in direct conflict with the notions of race neutrality and equal protection adhered to by this Court since *Brown v. Board of Education,* 347 U.S. 483 (1954),[20] these students and faculty are, nevertheless, represented in this case and are, therefore, not incapable of protecting their own interests, a condition to the invocation of the *jus tertii* doctrine. *See Singleton v. Wulff,* 428 U.S. 106, 113 (1976).

Third, prudential standing limitations militate against according standing to ASU to assert the rights of students

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[20]Auburn challenges the standing of the Knight-Intervenors in its appeal of the district court's final order on the ground that their claims do no more than assert the non-existent right of ASU, as an institution, to equal protection. *Cf. Valley Forge Christian College v. Americans United,* 454 U.S. 464, 476 n.14 (1982) (Respondent's standing claim is identical to that of parties whose interests it seeks to represent); and that they have no personal constitutional interest in the predominance of ASU in the Montgomery area. The validity of the Knight-Intervenors' claims, however, is irrelevant to the issue of whether ASU's students and faculty are capable of protecting their own interests.

and faculty. Other litigation and the evidence in this case indicates that ASU itself is guilty of racial discrimination. In *Craig v. Alabama State University,* 451 F. Supp. 1207 (M.D. Ala. 1978), *aff'd,* 614 F.2d 1295 (5th Cir.), *cert. denied, sub nom., Dutt v. Alabama State University,* 449 U.S. 862 (1980), the district court found that officials of ASU had discriminated in the hiring and promotion of white faculty. Recently, the United States Court of Appeals for the Eleventh Circuit held that discrimination against whites continues at ASU. *Craig v. Alabama State University,* 804 F.2d 682 (11th Cir. 1986). The evidence at trial in this case established that ASU's administration pursued its "black agenda" at the expense of attracting white students.

ASU's admitted desire to retain its racial character, coupled with its continuing racial discrimination, illustrate that it may not be willing to vigorously present all evidence of alleged racial discrimination in the operation of Alabama's public colleges. Such a conflict of interest should preclude *jus tertii* standing. *See School District of Kansas City v. State of Missouri,* 460 F. Supp. 421, 440-442 (W.D. Mo. 1978).

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CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent, Auburn University

Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CASE NO.
CV-83-C-1676-S

THE STATE OF ALABAMA, et al.,

Defendants.

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia,* that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in Jan-

uary, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21. realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD

BY: /s/ Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama 36104
(205) 269-2563

Attorney for Board of Trustees for
Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

Ira Dement—
Dement & Wise
P. O. Box 4163
Montgomery, Alabama 36101

FOR: George C. Wallace
The Alabama Commission on
Higher Education
The State of Alabama
The Alabama Public School
and College Authority

Glenn Powell—
P. O. Box 295
Tuscaloosa, Alabama 35401

FOR: The University of Alabama

and

Paul Skidmore
P. O. Box 6233
University, Alabama 35486

Charles Coody— FOR: Wayne Teague
Assistant Attorney General Alabama State Board of
Department of Education Education
State of Alabama
Montgomery, Alabama 36130

Thomas Thagard— FOR: Auburn University
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and
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Civil Rights Division
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Washington, D. C. 20530

/s/ Solomon S. Seay, Jr.

EXHIBIT I

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U.S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and the Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

Agenda Item #6

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CIVIL ACTION NO. CV-83-C-1676-S

THE STATE OF ALABAMA, et al.,

Defendants.

MOTION AND NOTICE FOR TEMPORARY RESTRAINING ORDER

Realigned Plaintiff Board of Trustees for Alabama State University hereby moves this Court for a Temporary Restraining Order restraining and enjoining the defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from failing and refusing to take the necessary steps to recertify the following Education Programs at Alabama State University, pending a hearing and determination of realigned plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction: Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor.

Unless this motion is granted, realigned plaintiff Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss and damage if defendants are permitted to decertify the above-enumerated programs until a hearing can be had on this motion, as more fully appears from the verified Complaint attached hereto.

DATED this 13th day of August, 1985

Respectfully submitted,

/s/ SOLOMON S. SEAY, JR.

/s/ TERRY G. DAVIS

ATTORNEYS FOR REALIGNED
PLAINTIFF
BOARD OF TRUSTEES FOR ALABAMA
STATE UNIVERSITY
732 Carter Hill Road
Post Office Box 6215
Montgomery, Alabama 36106
(205) 834-2000

NOTICE OF MOTION

TO: ALL ATTORNEYS OF RECORD FOR DEFENDANTS IN THE ABOVE-STYLED CAUSE

Please take notice that on the — day of ————, 1985 at 9:00 o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will bring the above motion on for hearing before the Honorable U. W. Clemon, United States District Judge, at the United States Courthouse, Birmingham, Alabama.

/s/ SOLOMON S. SEAY, JR.

/s/ TERRY G. DAVIS

CERTIFICATE OF COUNSEL

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, the undersigned attorney of record for Realigned Plaintiff Board of Trustees for Alabama State University,

hereby certify that a copy of the above and foregoing motion was mailed to the attorneys for all of the parties on the 13th day of August, 1985.

I further hereby certify that a copy of the above and foregoing motion was hand delivered to the Office of Attorney Charles Coody, the attorney representing defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, and that I was advised by Mr. Coody's Office that he would be out of town until Thursday, August 15, 1985.

/s/ SOLOMON S. SEAY, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CIVIL ACTION
NO. CV-83-C-1676-S

THE STATE OF ALABAMA, et al.,

Defendants.

COMPLAINT

Jurisdiction

1. This action arises under the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. §§ 1981 and 1983, and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. Jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. §§ 1331, 1343(3), and 1341(4), 2201 and 2202.

Parties

2. The parties to this action are correctly enumerated in this Court's Principal Pretrial Order dated February 19, 1985; except Livingston University and the University of Montevallo, whose Rule 41(b) motions were granted.

Allegations of Fact

2. Realigned Plaintiff Board of Trustees for Alabama State University in its statement of Amended Claims, heretofore filed in this case, alleged:

"12. Exercising its authority under *Ala. Code,* Sec. 16-24-14 (1975), the defendant State Board has also prescribed minimum requirements for faculty members in programs for instructional support personnel. Approval of an institution's teacher education program is contingent upon meeting these requirements which include the following:

a. That they hold an earned doctorate, or the equivalent, with a major emphasis in the field of specialization in which the major workload is assigned;

b. That they have a minimum of three years of successful experience as a practitioner in the instructional support area in which the major workload is assigned;

c. That at least one faculty member in each instructional support area in which a program leading to certification is offered shall hold an earned doctorate with an area of specialization in that field.

"13. In May 1984, a review team appointed by the defendant State Superintendent of Education recommended that no students be admitted to the following programs at ASU because faculty members in these programs did not meet some or all of the aforegoing faculty requirements:

a. The Class A and Class AA Superintendent Program: of the two faculty members in this program at ASU, both have the appropriate doctorates, but neither has three years experience as superintendent. One faculty member with an appropriate degree and three years of experience as a superintendent is required for the Class A program; two such faculty members are required for the Class AA program.

b. The Class A and Class AA General Supervisor Program: of the two faculty members in this program at ASU, both lack the required doctoral

level preparation in supervision, and both lack the three years of experience as a supervisor. One faculty member with appropriate preparation and experience is required for the Class A program; two such faculty members are required for the Class AA program.

c. The Class A and Class AA Reading Supervisor Program: of the two faculty members in this program at ASU, both have the required doctoral level preparation, but neither has three years of experience as reading supervisor. One faculty member with appropriate doctoral level preparation and three years of experience as a reading supervisor is required for the Class A program; two such faculty members are required for the Class AA program.

d. The Class A and Class AA Library Media Program: the one faculty member in this program at ASU is fully qualified, but State Board regulations require a minimum of two faculty members meeting the aforesaid requirements for the Class A program. No additional faculty member is required for the Class AA program."

3. The Amended Claims further alleged that:

"14. The State Board's requirements for faculty in programs for instructional support personnel and the recommendations of the May 1984 review team at ASU have an adverse racial impact on black students and traditionally black institutions, including ASU, and they perpetuate the vestiges of the prior *de jure* system of racial segregation at all levels of public education in Alabama. Because of historical segregation and racial discrimination against black students and black professionals, there are disproportionately few black educators who can satisfy faculty requirements for instructional support personnel programs, namely, three years experience as a superintendent, supervisor, reading supervisor or supervisor of library media and doc-

toral level preparation in those specific fields of specialization."

"15. The faculty requirements for instructional support personnel programs are not necessary for the successful operation of such programs or for the successful preparation of students in those programs."

"16. The requirements for faculty in instructional support personnel programs have both the purpose and the effect of discriminating against black students, black professionals and traditionally black institutions."

4. The Amended Claims also sought, *inter alia,* preliminary and permanent injunctions restraining and enjoining the defendants from continuing to enforce the minimum faculty requirements for instructional support personnel programs.

5. On, to-wit, the 8th day of August, 1985, the defendant State Board of Education failed and refused to recertify the Class A and Class AA Superintendent Programs, the Class A and Class AA General Supervisor Programs, and the Class AA Reading Supervisor Program at Alabama State University, allegedly by reason of the fact that Alabama State University failed to meet the faculty experiential requirement. The Board's action had the purpose and effect of decertifying said programs after September 9, 1985. A copy of the State Board of Education's resolution is attached hereto as Exhibit 1, and incorporated herein by reference and made a part hereof as if herein set forth in full.

6. Faculty personnel assigned to the above-named instructional support personnel programs at Alabama State University are all persons with faculty rank and tenure, and

are otherwise qualified except for experiential requirements. Each is black.

7. Experiential requirements adopted by the Board, and the action of the defendant Board in decertifying the programs at Alabama State University have both the purpose and effect of discriminating against black students, black professionals and traditionally black Alabama State University.

8. Unless restrained and enjoined by this Honorable Court, the action of said Board will have the effect of depriving Alabama State University of a major portion of its Teacher Education Program, in violation of due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981 and 1983.

PRAYER FOR RELIEF

WHEREFORE, Realigned Plaintiff Board of Trustees for Alabama State University respectfully prays that this Court take cognizance of this Complaint for Temporary Restraining Order and for Preliminary Injunction, and after careful consideration of the matters and things set forth herein, enter Temporary Restraining Order and Preliminary Injunction:

(1) restraining and enjoining defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert and participation with them, from failing and refusing to recertify the Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor Programs at Alabama State Uni-

versity pending final hearing and determination of this claim;

(2) mandatorily requiring that the defendants State Board of Education and Wayne Teague, State Superintendent of Education. and all persons in active concert and participation with them, recertify the Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class A Reading Supervisor Programs at Alabama State University pending final hearing and determination of the merits of this claim.

Respectfully submitted,

/s/ SOLOMON S. SEAY, JR.

/s/ TERRY G. DAVIS
ATTORNEYS FOR REALIGNED PLAINTIFF BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY

ADDRESS OF COUNSEL:

732 Carter Hill Road
Post Office Box 6215
Montgomery, AL 36106
(205) 834-2000

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I hereby certify that I have read the foregoing Complaint, and know the contents thereof, and that the matters and things set forth therein are true and correct to the best of my knowledge, information and belief.

/s/ BEATRICE MORSE

SWORN TO AND SUBSCRIBED before me this the 13th day of August, 1985.

/s/ Solomon S. Seay, Jr.
NOTARY PUBLIC
STATE OF ALABAMA AT LARGE
MY COMMISSION
EXPIRES: 2-1-89

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing COMPLAINT upon the following persons, by placing same in the United States Mail, first-class postage prepaid, on this the 13th day of August, 1985:

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/s/ Solomon S. Seay, Jr.

[Exhibits Omitted]

Charles R. CRAIG, for himself and for all others similarly situated, Plaintiffs,

Dorothy D. Moore, Plaintiff-Appellant,

v.

ALABAMA STATE UNIVERSITY; Levi Watkins, individually and in his official capacity as President of Alabama State University; the Board of Trustees of Alabama State University; Mrs. L.W. Noonan; Dr. R.J. McLaughlin; Mayor Andrew M. Hayden; Ross Dunn; Robert L. Potts; Tom Radney; Lewis J. Willie; Mayor A.A. Chandler; and Robert L. Glynn, individually and in their official capacities as Members of the Board of Trustees of Alabama State University; Ed Moss; Dr. Aaron Van Wright and Isaac Sanders, Defendants-Appellees.

No. 85-7325.

United States Circuit Court,
Eleventh Circuit.

Nov. 18, 1986.

White applicant, who had been denied administrative position at state university having staff which was already over 70% black, filed employment discrimination suit under Title VII. The United States District Court, Middle District of Alabama, No. 76-21-N, Truman M. Hobbs, Chief Judge, entered judgment in favor of university, and appeal was taken. The Court of Appeals, Morgan, Senior Circuit Judge, held that: (1) applicant for administrative position in state university, whose application was denied based on university's policy of granting hiring preferences to current employees on work study program, made prima facie showing of discrimination impact based on imbalanced nature of university's work force, and (2) university failed to show that hiring policy was justified as "business necessity."

Reversed and remanded.

1. Civil Rights 9.10

Any Title VII claim may be analyzed in terms of disparate impact, though claim is brought by individual plaintiff based on defendant's failure to hire her to particular position. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Civil Rights 44(1)

Applicant for position at state university, made prima facie showing that university's facially neutral policy of granting hiring preferences to current employees had discriminatory impact, where university's work force was already imbalanced. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights 43

In Title VII action, employer had burden of articulating and proving that there was "business necessity" for adopting hiring practice that had discriminatory impact. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights 44(1)

University failed to show that its policy of granting hiring preference to current employees on work study program was justified by "business necessity," for purpose of unsuccessful applicant's Title VII suit, where preference was not tied to requirement that course of study pursued by employee bear a particular relation to requirements of job being applied for. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Alexander W. Jones, Jr., Pritchard, McCall, Jones, Spencer & O'Kelley, F. Hilton-Green Tomlinson, Robert L. Wiggins, Jr., Gordon Silberman, Wiggins & Childs, Robert F. Childs, Jr., Birmingham, Ala., for plaintiff-appellant.

Solomon S. Seay, Jr., Montgomery, Ala., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT and ANDERSON Circuit Judges, and MORGAN, Senior Circuit Judge.

MORGAN, Senior Circuit Judge:

Appellant Dorothy Moore appeals from an adverse decision rendered below on the merits of her claim brought under Title VII of the Civil Rights Act alleging racial discrimination by Alabama State University in relation to her application for employment. The appellant contends that the lower court erred in failing to properly apply disparate impact analysis to the facts of this case. Having reviewed the record, we agree that the district court's analysis was flawed and reverse and remand for determination of the appropriate remedy.

I.

This lawsuit has its genesis in an earlier discrimination suit leveled against Alabama State University (ASU) in the 1970's. In that suit, styled *Craig v. Alabama State University*, 451 F.Supp. 1207 (M.D.Ala. 1978), then District Judge Frank M. Johnson, Jr. found that Alabama State University had engaged in a pattern and practice of discrimination against whites in the hiring of administrative, clerical and support staff, as well as faculty. That finding

culminated in appropriate injunctive relief forbidding any further discrimination on the part of ASU in all aspects of hiring practices at the university. The instant case was filed as a continuation of these prior proceedings in the form of a Motion For Contempt alleging that the defendants had violated the court's 1978 injunction prohibiting discriminatory employment practices.

The facts from which the Motion For Contempt arose involved appellant Dorothy Moore's application for the position of Federal Relations Director at ASU in 1983. Many of the facts underlying her claim, as found by the district court, are largely undisputed, and we of course accept the factual findings of the district court as correct unless clearly erroneous. *See Pullman-Standard v. Swint,* 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66 (1982). The district court found that the appellant is a white female who in 1983 approached Dr. Robert Randolph, the President of ASU, in search of a position at the institution. She was advised that although nothing was presently available, if grant funds could be obtained she could be employed on a temporary basis. Subsequently, in light of indications that the appellant had obtained such a grant commitment to commence later in the year, Randolph employed her on an interim basis in the job of Acting Assistant Director of Federal Relations.[1] That position bore the responsibility of acquiring grants for the university.

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1. Moore was actually hired under the title of Assistant Director of University Relations. Testimony at trial indicated that the university relations position and the federal relations position were essentially one in the same. The reason for the difference in the titles relates to a proposed organizational change that never took place and is not relevant to the issues at hand. The district court apparently utilized only the title of Director of Federal Relations, and for purposes of uniformity, we shall also.

At the time the appellant assumed the position, she was given two contracts. The first covered the limited period of July 1 to September 30, 1983, and the second from October 1, 1983 to September 28, 1984. At the time that the appellant assumed the position, it was understood that eventually the opening would have to be advertised according to university policy for permanent positions, although the president did have authority to fill such positions in the interim. Thereafter, at a meeting of the Board of Trustees of ASU on August 15, 1983, the matter of appellant Moore's employment came to the attention of the Board. The Board was not apprised of her second contract, and accordingly concluded that its obligation to Ms. Moore ceased upon the expiration of the first contract. After the Board meeting, Dr. Randolph contacted the appellant and informed her that in light of the Board's posture, her contract would "self-destruct" at the end of the first contract. The plaintiff testified and the district court found, that at that point she voluntarily "stepped aside" from the second contract based upon assurances that the job would have to be advertised and that she should apply for it. The position was thereafter advertised in *The Chronicle of Higher Education* dated August 31, 1983, with applications being invited until the deadline of September 30, 1983. Close to this time, a Search Committee was formed to review applications for the Director of Federal Relations position.

In the meantime, another set of events was transpiring which would have a direct effect upon the appellant's application for the position of Director of Federal Relations. In August of 1983, Ms. Jacqueline Mallory Williams contacted ASU and advised the university that she was now available for re-employment pursuant to a study leave agreement that she had entered with the university on September 25,

1981. Mrs. Williams, who is black, had been employed at the university since 1964. Prior to taking study leave, she had been an assistant to Dr. Randolph's predecessor, Dr. Levi Watkins. The letter agreement provided that Ms. Williams would be granted a two-year study leave to pursue her doctorate degree at the University of Alabama at Tuscaloosa, during which time she would continue to receive a partial salary from ASU. Upon completion of her studies, the agreement provided for her return to ASU in a "faculty or other mutually acceptable position" at her previous salary, which was $31,420.00 per year. Early in September of 1983, Ms. Williams again contacted the university regarding her availability and a list of potential vacant positions was compiled for her scrutiny. Only one of the available positions, Athletic Director, provided a salary commensurate with Ms. Williams' previous salary.

On September 24, 1983, the Board of Trustees for ASU met again. At that meeting Dr. Randolph recommended to the Board that Ms. Williams be hired as Director of Federal Relations, a position that she had expressed some interest in shortly before the meeting, and the Board accepted this recommendation. Although the position had an advertised salary range of $21,000-$25,000 per year, Ms. Williams' contract was issued in the amount of $31,420.00, concomitant with her salary prior to taking study leave. After this action was taken on September 24, 1983, the appellant filed an application for the position on September 30, 1983, inasmuch as she was not informed that the position had been given to Ms. Williams. The parties stipulated that the Search Committee was disbanded without having reviewed any applications, and the Board considered only Ms. Williams' qualifications in making the decision to fill the posi-

tion. Although the position was filled before the close of the application period, none of the applicants, including the appellant, were notified of that fact until sometime in October of 1983.

In sum, the district court found that both the appellant and Ms. Williams were qualified for the position of Director of Federal Relations. Although the university had a policy allowing the appointment of temporary employees to fill vacancies, those temporary employees received no enhanced rights regarding permanent appointment to the position vis-a-vis other applicants. The court concluded that "Ms. Williams was hired as Director of Federal Relations because of the obligation of the University to find her a 'mutually acceptable' job upon her return from study leave and that the position of Director of Federal Relations was the only available job which met the requirements of the University's obligations and was consistent with Ms. Williams' qualifications." [Rec. at 097].

On appeal, the appellant raises only one challenge to the adverse decision below—that the district court erred in its application of disparate impact analysis to the aforementioned factual findings.[2]

II.

Disparate impact analysis in Title VII cases emanates from the Supreme Court case of *Griggs v. Duke Power Co.*,

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2. The appellant also raised a Title VII claim for disparate treatment and a breach of contract claim arising out of the cancellation of her second contract. The district court's adverse rulings on these claims are not on appeal here.

401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) and its offspring. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). These cases set forth a tripartite scheme of analysis for employment practices that are "fair in form, but discriminatory in operation." First, to establish a prima facie case of discrimination in such cases, the complaining party must demonstrate that the defendant employed a facially neutral employment practice that had a significant discriminatory impact. The burden then shifts to the employer to show that the challenged employment practice has a "manifest relationship" to the employment in question, or in other words that it is supported by "business necessity." *See Griggs,* 401 U.S. at 431-32, 91 S.Ct. at 853-54, 28 L.Ed.2d at 164-65. Should the employer carry that burden, the employee must still be provided the opportunity to demonstrate that the employer was using the practice as a pretext for discrimination or that other criteria were available with a lesser adverse impact on the minority that would still serve the employer's needs. *See Albemarle Paper Co.,* 422 U.S. at 425, 95 S.Ct. at 2375, 45 L.Ed.2d at 301.

The first task in this case, therefore, is to determine whether the appellant carried her burden of demonstrating that the defendant engaged in a facially neutral employment policy or practice that had a significant discriminatory impact on white persons. *Griggs* counsels that disparate impact is shown not only where a direct adverse impact can be shown, but also where "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, . . . operate to 'freeze' the status quo of

prior discriminatory employment practices." 401 U.S. at 430, 91 S.Ct. at 853, 28 L.Ed.2d at 163. *See also Giles v. Ireland,* 742 F.2d 1366, 1379-81 (11th Cir. 1984).

The appellant urges that ASU had an employment practice of granting hiring preferences to its current employees embodied by the individual study leave agreement entered with Williams. The district court found that this agreement represented the university's study leave policy.[3] A preference to hire from within is facially neutral—all outside applicants, regardless of race, are excluded from consideration for a vacancy being filled. But where, as here, the employer in the past exercised a pattern of racial discrimination, the failure to consider outside applicants necessarily impacts more harshly on minorities because the preference operates to their total exclusion and to the benefit of the employer's racially skewed workforce.[4] In analogous reasoning, the Tenth Circuit has observed that

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3. Rec. at 096; 101.

4. The following excerpts are taken from the university's compliance reports filed pursuant to the *Craig* injunction:

ALABAMA STATE UNIVERSITY
WORKFORCE PERCENTAGES

	Oct. 1978	Oct. 1981	Nov. 1984
ADMINISTRATIVE			
White	6%	13%	10%
Black	94%	87%	90%
INSTRUCTIONAL			
White	22%	29%	25%
Black	70%	64%	67%
PROFESSIONAL			
White	6%	8%	3%
Black	94%	92%	95%

"It is beyond argument that a rating procedure used by an historically segregated employer which favors applicants already employed full-time falls squarely within the prohibition of *Griggs*." *Thornton v. Coffey*, 618 F.2d 686, 691 (10th Cir.1980). Judge Johnson's earlier decision in *Craig* establishes that ASU engaged in purposeful discrimination in all phases of employment practices resulting in an overwhelming imbalance in the racial composition of its workforce, *see* 451 F.Supp. at 1208, that persists virtually unchanged.[5] The utilization of a hiring preference

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5. In this regard, the lower court concluded:

> While this Court was disturbed by some of the testimony with respect to efforts being made to comply with the letter and spirit of the *Craig* order at ASU, this is not a matter which moves this Court to action under *Craig*. The testimony at trial, however, which did relate to compliance with *Craig*, has moved this court to a determination that future *Craig* compliance reports shall be more carefully scrutinized.

Rec. at 106. Testimony at trial indicated that ASU has had an affirmative action plan in place since 1978, *see* Plaintiff's Exhibit No. 26, that went unused and was virtually inoperative from at least 1980-1985. *See* Rec. at 123; 141-44; 373-74. Furthermore, we note that the *Craig* injunction directed that the university file compliance reports at six month intervals setting forth "by category (administrative, teaching, clerical, and support) and race, the staff employed, applications received, new hirees, and tenure and promotions granted." Supp.Rec. at 145. Although Moore was reported as a new white hire, Defendant's Exhibit No. 22, at 6; Defendant's Exhibit No. 25, at 4, the reports from the relevant period do not report the hiring of Williams into the Director of Federal Relations position at all as either a "new hire" or a "promotion." Defendant's Exhibit Nos. 22 and 23. Presumably, this was because of testimony at trial that since Williams was never taken off of the university's payroll, she was "reassigned" to the Director's position. Nevertheless, it certainly raises questions as to whether those taking study leave are properly reported under the *Craig* injunction.

in such circumstances, as we see it, is the plainest means possible of perpetuating the status quo of a racially imbalanced workforce.

[1] Although the appellees' contentions are far from clear, they contend that disparate impact analysis is inappropriate as to individual, rather than class, claims and that an "ad hoc" or "one shot" application of a selection criteria cannot have a disparate impact. Any given case, however, may be analyzed in terms of disparate treatment or disparate impact, *Teamsters v. United States,* 431 U.S. 324, — 338 n. 15, 97 S.Ct. 1843, 1855 n. 15, 52 L.Ed.2d 396, 415 n. 15 (1977), and as the Supreme Court observed in *Connecticut v. Teal,* 457 U.S. 440, 455-56, 102 S.Ct. 2525, 2535, 73 L.Ed. 2d 130, 143 (1982), every *individual* employee is protected against discriminatory treatment *and* neutral practices that are discriminatory in operation. Relying upon such reasoning, two courts have explicitly concluded that disparate impact claims may be brought by aggrieved individuals in a private, non-class action. *See Lasso v. Woodmen of World Life Ins. Co.,* 741 F.2d 1241, 1245 (10th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 2320, 85 L.Ed.2d 839 (1985); *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers,* 568 F.2d 558, 566 (8th Cir. 1977). Numerous other courts have implicitly concluded as much by applying disparate impact analysis to individual claims pending before them. *See Nash v. Consolidated City of Jacksonville,* 763 F.2d 1393, 1397 (11th Cir.1985); *Walker v. Jefferson County Home,* 726 F.2d 1554, 1557 (11th Cir.1984). We perceive no impediment to using disparate impact analysis as to the appellant's individual claim.

The appellees also contend that an "ad hoc" application of a selection criteria cannot have a disparate impact, although they cite no authority for this proposition. Most of the authority we have found seems to support this view, although there are also indications to the contrary. *Compare Peters v. Lieuallen*, 746 F.2d 1390, 1392 (9th Cir. 1984); *Yartzoff v. State of Oregon*, 745 F.2d 557, 558-59 (9th Cir.1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 121 (3rd Cir.), *cert. denied*, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983); *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir.1981), *with Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir.1984); *Massarsky v. General Motors Corp.*, 706 F.2d at 130-131 (Sloviter, J., dissenting); *Thornton v. Coffey*, 618 F.2d 686, 690-91 (10th Cir.1980). *Walker*, the decision from this circuit, involved an individual disparate impact claim brought by an employee of the county home challenging her failure to receive the position of Housekeeping Department supervisor. The home had established a requirement of prior supervisory experience as a qualification for the position, which was neutral on its face because it applied to all applicants. The requirement had an adverse effect on black employees, however, because of the home's prior discrimination in favoring whites for promotion into positions in which the supervisory experience could be obtained. The court therefore found a prima facie case of disparate impact on the black employees as a class while analyzing the impact of the supervisory experience criteria only in the context of the one supervisory position at issue, which was awarded to a white employee who had prior supervisory experience. 726 F.2d at 1558.

Even if *Walker* is not determinative here, the appellees' "ad hoc" theory fails factually based upon the record adduced below. As noted earlier, the district court found that Williams' study leave agreement constituted the university's study leave policy. At trial, Jacqueline Williams identified a list of 99 persons who had taken study leave from the university during the tenure of Dr. Watkins as president. From that list, she identified numerous persons aside from herself who had taken non-academic study leave.[6] This testimony was sufficient to rebut the appellees' contention that the hiring preference shown as to Ms. Williams was nothing more than an "isolated" or "ad hoc" occurrence.[7]

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6. *See* Rec. at 290-98; Defendant's Exhibit No. 42, at 52-53.

7. The logical corollary of this argument, which the appellees may be asserting, is that this factual showing does not demonstrate disparate impact because the appellant did not produce a statistical breakdown of the racial makeup of employees who took study leave. Rather, the appellant must rely solely on the statistical evidence that the university's workforce was 70% to 90 percent black in most relevant categories, *see supra* note 4, and therefore the practice of giving a preference to members of the workforce weighs more heavily on whites, or at least perpetuates the status quo. We recognize that a "plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue." *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Nevertheless, the appellees have not cited any authority for the proposition that the *only* way of proving that impact is through statistics of the actual racial composition produced through operation of the criteria. Rather, as the Fourth Circuit observed in *Mitchell v. Board of Trustees of Pickens County*, 599 F.2d 582, 585 n. 7 (4th

(Continued on following page)

[2] Finally, in regard to the appellant's initial burden, the real heart of the appellees' argument seems to be the

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Cir.), *cert. denied*, 444 U.S. 965, 100 S.Ct. 453, 62 L.Ed.2d 378 (1979):

> Statistical proof of actual applications is not of course indispensable to proving the disparate impact *prima facie* case, particularly where, as here, the action is individual and not class. Circumstantial evidence, complemented by judicial notice to show that a facially neutral policy must in the ordinary course have a disparate impact on a protected group of which an individual plaintiff is a member is often utilized.

See also Wright v. National Archives & Records Service, 609 F.2d 702, 712 (4th Cir.1979) (recognizing *Mitchell* in context of a race claim). In *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir.1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981), the court found a policy that made over 90 percent of the protected age class ineligible for hiring to be discriminatory as a matter of law "since, absent countervailing statistics, the likelihood of a [protected] person . . . being selected under the policy would be substantially less than that of a [non-protected] person . . . ." In line with such reasoning, in *Walker* we eschewed statistical analysis altogether in a perpetuation of prior discrimination case where actual impact was shown on the individual minority member and the discriminatory impact was obvious from the record. And as the Supreme Court has cautioned in regard to reliance on statistics, a plaintiff is "not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact." *Dothard v. Rawlinson*, 433 U.S. 321, 331, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786, 798 (1977). In short, the workforce composition statistics are not so weak as to merely raise an "inference" based upon speculation or conjecture. *See Sakellar v. Lockheed Missile and Space Co.*, 765 F.2d 1453, 1456-57 (9th Cir. 1985); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 121 & n. 18 (3d Cir.), *cert. denied*, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983). Rather, we view them as strong probative evidence that a hiring preference granted employees within the workforce will perpetuate that racial imbalance sufficient to carry the appellant's initial burden of proof.

lower court's conclusion that the university acted as it did in response to its contractual obligation to Williams, and that therefore there was no "hiring preference" involved in the selection of the Director of Federal Relations.[8] It appears to us, however, that the form taken by the selection criteria (i.e.. as a contractual obligation) is irrelevant to the inquiry at hand. The university was under no compulsion to enter the study leave contract with Williams. In fact, because of its prior discriminatory employment practices, the university had an obligation under *Griggs* to not utilize selection criteria that maintain the status quo of its racially imbalanced workforce. It is circuitous indeed to reason that the university can avoid that obligation by *voluntarily* entering contracts with individual employees that have just that effect, and then set up those contractual obligations as a defense to the discriminatory effects flowing therefrom. *Compare W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) (where company voluntarily entered both conflicting collective bargaining agreement and conciliation agreement,

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8. The lower court undertook no discernible analysis in finding no hiring preference, which leaves us somewhat in the dark as to its exact reasoning in making that finding. It appears unlikely, however, that the court concluded as a pure *factual* finding that there was no hiring preference afforded Williams here. The study leave contract on its face states an obligation to reemploy Williams, which the university unquestionably treated as entitling her to whatever position it deemed acceptable without considering the effect on any other applicants. *See*, e.g., Rec. at 36; 392; 410-11. Any finding to the contrary would be clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518, 528 (1985).

and the company chose to violate the collective agreement in making layoffs in order to avoid Title VII liability, public policy did not forbid liability under the collective agreement because the company was "cornered by its own actions"); *Williams v. New Orleans Steamship Ass'n,* 673 F.2d 742, 750-51 (5th Cir.1982) (rights under Title VII cannot be bargained away; the fact that a contract limits employment opportunities is no justification if the result is discriminating) (citations omitted), *cert. denied,* 460 U.S. 1038, 103 S.Ct. 1428, 75 L.Ed.2d 789 (1983).

The contractual nature of the hiring preference does not negate whatever disparate effect it may have. Rather, the university's interests in the contract in this regard are adequately accounted for in determining the business necessity for entering the contract and granting the resulting hiring preference. In short, there was evidence of numerous instances of study leave occurring at the university. Granting such hiring preferences in the form of study leave to a workforce already established as racially unbalanced through prior discrimination necessarily falls more heavily on minorities who are not considered for positions filled by those favored employees. We conclude that under the facts of this case, the appellant has made a showing of a hiring preference with a disparate impact on minority applicants.[9]

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9. The appellant has argued that the university's Nonacademic Staff Handbook, which explicitly states a hiring priority for present university employees over outside applicants, also created a hiring preference amenable to disparate impact analysis. The appellees attempt to disavow any relationship between this general hiring preference and this case urging that

(Continued on following page)

III.

Although finding to the contrary, the district court assumed for purposes of analysis that the plaintiff had established a facially neutral hiring preference with disparate impact. The court then turned its attention to the defendant's burden of demonstrating business necessity. which it found because the "practice of granting leave to faculty members and administrative members to pursue advanced study serves a university's interest in getting bet-

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(Continued from previous page)

the Director of Federal Relations position was of a different sort than those positions covered by the Handbook. On one hand, the Handbook makes no such distinction and on its face appears to apply to all nonacademic positions. Our examination of the record reveals no significant deviation in this case from the hiring procedures set forth in the Handbook that would indicate that the Handbook policy does not apply to the Director position. On the other hand, there is no affirmative evidence in the record indicating that the Board recognized and considered this general policy in filling the Director's position. A fair reading of the lower court's opinion indicates that it found that the university acted *solely* because of its contractual obligation to Williams, and that finding would implicitly negate the appellant's attempt to bring this case under the operation of the general Handbook policy. The question of whether the Board acted pursuant to Williams' contractual preference, or pursuant to the general Handbook preference, or both, in filling the Director position is a finding of fact that may not be overturned unless clearly erroneous. Fed.R.Civ.P. 52(a). In light of the policy's seemingly clear application to all nonacademic positions, we might well have reached the conclusion that the general policy was a factor in the Board's actions were we afforded the opportunity for independent review. Under the clearly erroneous standard, however, the district court's conclusion is "plausible" based upon the record as a whole, and we are therefore bound by its finding. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518, 528 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 72 L.Ed.2d 66, 79 (1982).

ter qualified personnel." Rec. at 105. The court opined that the logical conclusion of the appellant's argument was that ASU could never maintain a study leave policy, for any obligation to rehire former employees would perpetuate the prior system found to be discriminatory under *Craig*. The court observed that to find in the appellant's favor would undermine one of the functions of a university—to provide its students with well-trained faculty. And finally, the court concluded that there had been no showing that an inordinate number of vacancies were filled with faculty members returning from study leave; therefore, other vacancies existed for hiring pursuant to the requisites of *Craig*.

[3]The former Fifth Circuit in numerous decisions still binding in this circuit[10] has set forth standards to be followed in considering whether business necessity has been sufficiently established in a given case.

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact.

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10. Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedent in this circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 245 (5th Cir.1974), *citing Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). *Accord Crawford v. Western Electric Co.*, 745 F.2d 1373, 1385 (11th Cir.1984); *Jackson v. Seaboard Coast Line Rd. Co.*, 678 F.2d 992, 1016 (11th Cir.1982). To sustain scrutiny, a practice with discriminatory impact must "not only *foster* safety and efficiency, but must be *essential* to that goal." *Pettway*, 494 F.2d at 244 n. 87, *citing United States v. St. Louis San Francisco Railway Co.*, 464 F.2d 301, 308 (8th Cir.1972) (en banc) (citations omitted), *cert. denied*, 409 U.S. 1116, 93 S.Ct. 913, 34 L.Ed.2d 700 (1973). *Accord Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir.1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). The business necessity doctrine is "very narrow," *Parson*, 575 F.2d at 1389, and the employer bears the burden of not only articulating but also *proving* business necessity through the evidence. *See Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 752 (5th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Having carefully reviewed the record, we find that the appellees have not carried their burden of establishing business necessity.

[4] First and foremost, we find absolutely no *evidence* adduced at trial to support the conclusion that a study leave policy with resulting hiring preference is necessary to promote a more qualified staff. There simply was no testimony presented at trial addressing any need or justification for a study leave policy, or even explaining why a university such as ASU would be compelled to utilize

such a policy. Rather, as the appellant urges, it appears that the district court made its finding of business necessity based upon a common sense notion that more education would necessarily improve the staff of the university. But it must be remembered that the prior discriminatory practices of ASU have created an artificially narrow workforce at the university based upon race, rather than based upon pure qualifications to perform a particular job. That racially constricted workforce, existing in a vacuum, would undoubtedly be enhanced through further education. It can be argued, however, that the university might better achieve its goal of improving its workforce by opening up all hiring decisions for vacant positions to the widest range of qualified persons possible, rather than resorting to promotion through educational incentives from within its own racially skewed workforce. As the appellant observes, there is no basis in this record to conclude that the educational leave policy would have been needed if the university had simply allowed all applicants, including the now-accessible pool of white applicants, to compete equally with current employees for future vacancies.

This reasoning is supported by what transpired in this case. Jacqueline Williams received a study leave agreement entitling her to two years partial salary to pursue her doctorate degree. Upon her return from the leave, she was placed into the Director of Federal Relations position without consideration of any other of the persons who had applied for the position. The evidence at trial indicated

that she received approximately $6,000 salary per year more than the highest rated salary at which the position was advertised. The position only called for a Masters' Degree,[11] which she possessed prior to taking her study leave, and the evidence at trial established that her course of study bore no particular relationship to the duties to be carried out in the federal relations position.[12] Although she was found "qualified" by the district court in the sense of possessing minimal qualifications for the position (as was the appellant), even the appellees' own expert witness rated Williams as the fifth highest qualified applicant behind four others.[13] In short, it is simply conjecture to contend that the leave policy in the instant case resulted in improvement of the university's administrative staff, as

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11. *See* Plaintiff's Exhibit No. 12 (advertisement in *The Chronicle of Higher Education*).

12. *See* Rec. at 149; 236-243. Williams' graduate course work was in Higher Education Administration. Although she had completed her coursework, she had not completed her dissertation at the time she returned to ASU, and therefore had not received her degree. Rec. at 272. Furthermore, much of the testimony concerning Williams' knowledge of obtaining grant monies came from exposure she had to grant proposals while working as Dr. Watkins' assistant, *prior* to leaving for study leave. Rec. at 248-50; 276-80; 305-06.

13. This witness, ASU's former Director of Federal Relations Isaac Sanders, ranked no applicants below Williams, and therefore he did not rank Moore in relation to Williams. Rec. at 313-14. In contrast, Dr. Randolph testified that he felt Moore was more qualified for the position than Williams, Rec. at 50, as did Dr. Gary Smith, the head of the search committee that never met. Rec. at 148. Dr. Carl Grafton, professor of political government at Auburn University at Montgomery, testified that Moore's masters in political science "very much" qualified her for a grantsman position such as here. Rec. at 163-64.

completion of the aborted search progress may well have resulted in employment of a more-qualified applicant at a lower salary.[14]

We reiterate that this case simply involves a failure on the part of the university to bear its burden of establishing business necessity for the hiring preference granted its existing employee. That the university did not carry its burden in this case does not, as the appellee contends, mandate the conclusion that ASU could never employ a study leave program. The policy involved here concerned leave for a member of the administrative staff, rather than for a member of the faculty. The terms under which the leave was granted included that the employee could return

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14. The appellees contend that because Moore was not among the top five applicants, she would not have received the appointment even if the selection process had remained open, and that therefore she has no claim. They rely on *Hereford v. Huntsville*, 574 F.2d 268 (5th Cir.1978). *Hereford*, however, was a disparate treatment case and the evidence of qualifications was relevant to the question of the employer's motives in making the challenged promotions. *See also McCarthney v. Griffin-Spalding County Bd. of Education*, 791 F.2d 1549, 1552 (11th Cir.1986). Motive is irrelevant, however, in a disparate impact case, *Griggs*, 401 U.S. at 430, 91 S.Ct. at 853, 28 L.Ed.2d at 163, and a plaintiff in a disparate impact case "need not prove . . . that he would have been the most qualified individual for the jobs. . . ." *Hung Ping Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir.1982), *citing, Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 240-245 (5th Cir.1974), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). At any rate, the appellees make factual assumptions not evident on this record. In short, there was conflicting evidence as to the relative qualifications of Moore and Williams, and even if there were applicants more qualified than either of them, there was also testimony at trial that many applicants offered jobs decline employment. Therefore, there is no factual basis upon which to conclude that Moore could not have received the appointment.

to a "mutually acceptable" position, which could mean virtually anything. Significantly, the policy was devoid of any mention of return to a specific position, nor was the preference tied to a requirement that the course of study pursued while the employee was on leave in some way bear a particular relation to the requirements of the job being applied for. There are any number of variables that might be accounted for in considering the necessity for a particular study leave policy, which individually or in combination could make the resulting hiring preference justifiable or at least more palatable. But the study leave policy invoked here was nothing more than a blanket preference instituted regardless of the employee's qualifications for the position or the qualifications of other applicants for the position. The defendant has not shown such a preference to be justified by business necessity.[15]

IV.

Having concluded that ASU failed to demonstrate job-relatedness or business necessity, we need not examine whether alternatives existed which would serve the em-

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15. We also reject the district court's reasoning that because there had been no showing that an "inordinate" number of vacancies were filled through study leave, other vacancies existed for hiring pursuant to *Craig*. This is the type of argument rejected in *Connecticut v. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), where the Court concluded that the "bottom-line" would not excuse employment opportunities lost by individual minority members.

ployer's needs with lesser impact or whether the practice was a pretext for discrimination. *See Walker,* 726 F.2d at 1559. Accordingly, the district court's judgment is REVERSED and we REMAND to that court for determination of the proper relief.

REVERSED and REMANDED

Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-749

In the Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
PETITIONER

v.

ALABAMA STATE BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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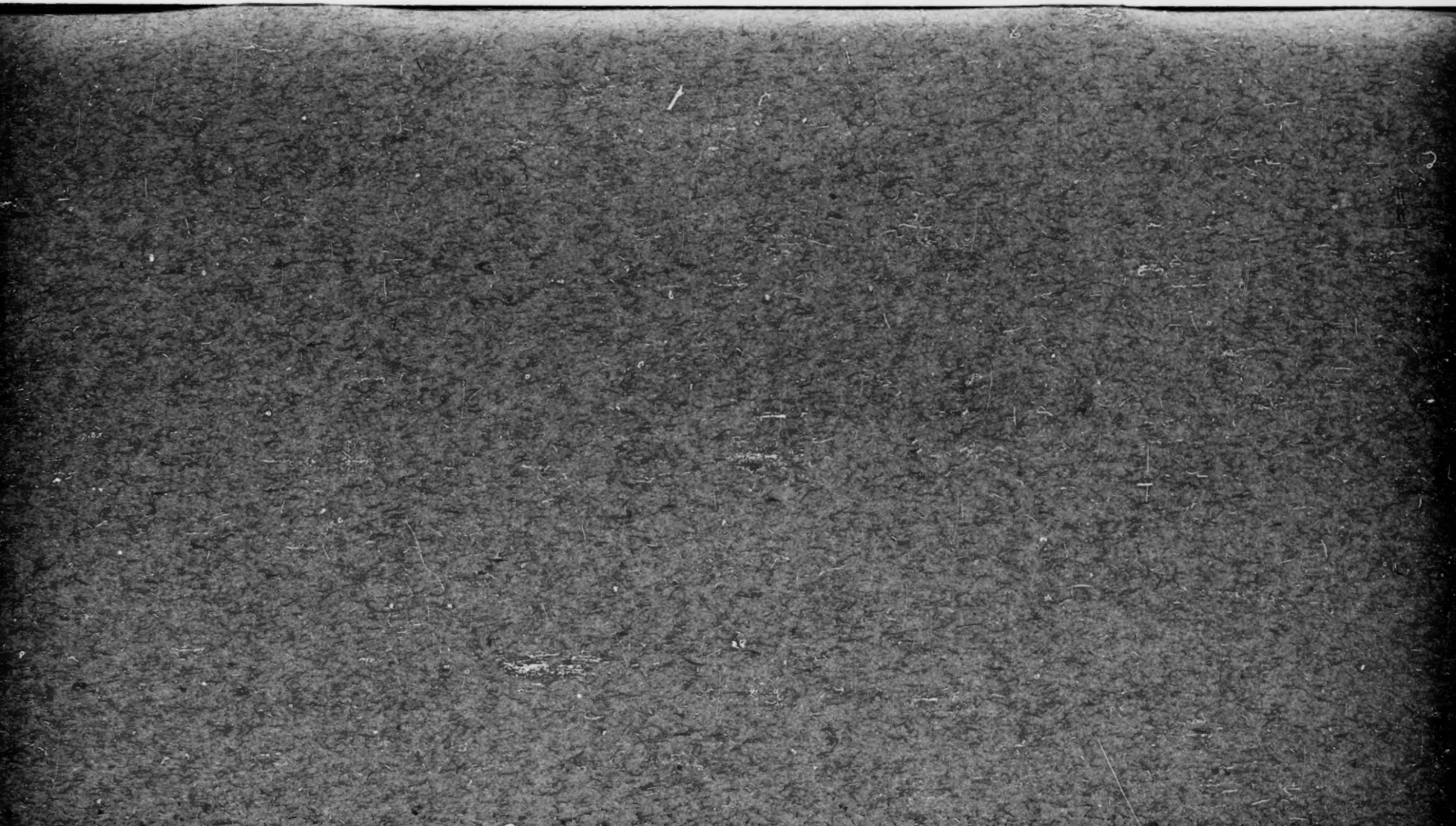

QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner, a state university, lacks standing under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, to challenge for its own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 791 F.2d 1450. The opinion and orders of the district court (Pet. App. 17a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a-30a) was entered on June 6, 1986. A petition for rehearing was denied on July 10, 1986 (Pet. App. 31a-32a). On September 29, 1986, Justice Powell extended the time for filing a petition for a writ of certiorari to and including November 7, 1986. The petition for a writ of certiorari was filed on November 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, prohibits recipients of federal financial assistance from discriminating on the basis of race in federally assisted programs or activities. In July 1983, the United States filed suit in the United States District Court for the Northern District of Alabama, alleging that the State of Alabama. the Alabama State Board of Education, and all state-supported four-year institutions of higher education in the State of Alabama had been maintaining a racially segregated system of higher education in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment (Pet. App. 2a). Petitioner, Alabama State University (ASU), a predominantly black college located in Montgomery, Alabama, was among the institutions that the United States named as parties defendant (*ibid.*).

Petitioner subsequently moved the court to realign it with the United States as a party-plaintiff (Pet. App. 2a). In so moving, petitioner argued that the "interests of the codefendants [were] antagonistic to [its] interests" (App., *infra*, 3a) and that it had "an interest * * * in obtaining essentially the same relief demanded by plaintiff" (*id.* at 2a). At approximately the same time, a class representing graduates of ASU, black adults or minor children in Alabama presently attending or eligible to attend an Alabama higher education institution in the Montgomery, Alabama area, and black citizens who were or might become employed by these higher education institutions moved to intervene as a party plaintiff (Pet. App. 2a). The court granted both petitioner's and the intervenors' motions (*ibid.*).

2. In August 1985, while the case was pending in the district court, the Alabama State Board of Education determined that it would not recertify certain of petitioner's undergraduate and graduate teacher education programs (Pet. App. 3a). Petitioner and the intervenors moved the district court preliminarily to enjoin the Alabama State Board of Education from doing so (*ibid.*). In seeking the injunctive order, petitioner alleged that it would "suffer immediate and irreparable injury, loss, and damage if defendants [were] permitted to decertify" these programs (App., *infra*, 4a-5a). The court issued the requested preliminary relief, finding that the decision not to recertify the teacher education programs was racially motivated (Pet. App. 22a) and that the status quo should be maintained until the underlying action brought by the United States could finally be resolved (*id.* at 23a).

3. On appeal of the district court's issuance of the preliminary injunction, the court of appeals affirmed in part and reversed in part (Pet. App. 1a-16a). While it rejected the "broad contention that [petitioner], as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States" (*id.* at 4a), the court found both that "[petitioner], as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983" (*id.* at 6a) and that "[n]othing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a 'person' with rights under this statute" (*id.* at 8a). Thus, it concluded that "[petitioner] has no standing under Section 1983 and Title VI to seek the injunction *sub judice*" (*id.* at 9a). Concomitantly, however, the court found "that the trial

court's entry of the preliminary injunction sought by the * * * intervenors against the Board was entirely appropriate" (*id.* at 13a-14a), reasoning that "[t]he standing of the * * * intervenors remains unchallenged" (*id.* at 9a), that "even the partial demise of [petitioner] would impede the ability of the trial court—and this [c]ourt on review—to remedy any violation of law proved in the statewide action originally brought by the United States and joined by the * * * intervenors" (*id.* at 14a-15a), and "that the intervenors had a substantial likelihood of success on the merits" (*id.* at 15a). Accordingly, the court affirmed "entry of this injunction, on behalf of the intervenors, against the members of the [S]tate Board in their official capacities," and reversed "the district court's entry of any injunction on behalf of [petitioner] * * *" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. An entity like petitioner clearly may not invoke the Equal Protection Clause or Title VI to challenge for its own benefit the racially discriminatory actions of the state-created system of higher education of which it is a part. This Court has long held that, "[b]eing but creatures of the State, municipal corporations have no standing to invoke the * * * provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator" (*Coleman* v. *Miller*, 307 U.S. 433, 441 (1939)). See generally *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *Risty* v. *Chicago, R.I. & Pac. Ry. Co.*,

270 U.S. 378, 389-390 (1926); *Trenton* v. *New Jersey*, 262 U.S. 182, 188 (1923); *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179 (1907). Title VI likewise is designed to protect individual rights and, in enacting that statute, Congress made no suggestion that it was granting state-created entities any rights that heretofore were unavailable under the Fourteenth Amendment. Cf. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.) (Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause"); *id.* at 328 (opinion of Brennan, White, Marshall, Blackmun, JJ.) (same). Accordingly, the decision of the court below—that a state-created entity like petitioner may not rely on either the Equal Protection Clause or Title VI to challenge for its own benefit the discriminatory actions of the state that created it—is correct.

2. Petitioner in fact acknowledges that this Court's cases "hold[] that in general disputes between arms or creatures of a State do not implicate federal rights" (Pet. 6). Petitioner notes, however, that "[i]n none of those cases * * * was there an argument—or a situation calling for such an argument—that the state-created entity making the claim was doing so on behalf of persons who indisputably have federal rights, or was doing so in pursuit of its own obligation under the Supremacy Clause to conform its conduct to the federal Constitution or a federal statute" (*ibid.*). Likewise, petitioner notes that, "[w]here such an argument *has* been made, state-created entities or members of boards of state-created entities have uniformly been allowed to sue to enforce the equal protection clause and similar constitutional or statutory provisions" (*id.* at 6-7

(emphasis in original)). Accordingly, petitioner contends that the court below erred in failing to "address the argument that the Board of Trustees of Alabama State University could raise claims either as a representative of its students and faculty, or in pursuance of the Board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land * * *" (*id.* at 5).

This contention is unfounded. The court below could not address an argument that petitioner did not present to it. Petitioner did not argue to the court of appeals that it was representing the interests of its students, faculty, or administrators. Rather, petitioner argued only that it had standing as an *institution* to seek the preliminary injunction. Accord, Ala. U. Br. in Opp. 5-6, 11. Thus, in answering respondents' argument to the court of appeals that petitioner was without standing, petitioner contended only that "Alabama State University as a creature of the State has federally protected rights under the Constitution and the Laws of the United States" (ASU C.A. Br. 21). Accordingly, the court below had only to decide "whether any given constitutional provision or law protects *the interests of the body in question*," to wit, petitioner. See Pet. App. 6a (emphasis added). Petitioner's recharacterization of its cause in its petition for a writ of certiorari cannot change the question presented to and decided by the court below.[1]

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[1] It may be that petitioner *intended* to argue to the court of appeals that it was representing the interests of its students, faculty, and administrators as well as the interests of the institution as a whole. In the district court, for example, petitioner alleged that it had "an interest * * * in obtaining essen-

Petitioner therefore errs (Pet. 5-10) in suggesting that the decision below conflicts with decisions of this Court and other courts which have held that state-created entities may challenge on behalf of their students and faculties the discriminatory actions of their state-creators. The school boards in the cited cases either alleged that a state statute or some other state action required a constitutional or statutory duty to be violated (see, *e.g.*, *State of Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982); *Board of Education* v. *Allen*, 392 U.S. 236 (1968)), or that they were representing the constitutional rights of their students or faculty (see, *e.g.*, *Akron Board of Educ.* v. *State Board of Education*, 490 F.2d 1285 (6th Cir.), cert. denied, 417 U.S. 932 (1974); *Bradley* v. *School Board*, 338 F. Supp. 67 (E.D. Va.), rev'd on other grounds, 462 F.2d 1058 (4th Cir. 1972), aff'd by an equally divided court, *sub nom. School Board* v. *State Board of Education*, 412 U.S.

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tially the same relief demanded by plaintiff" (App., *infra*, 2a-3a) as well as that the "realigned * * * Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss, and damage if defendants are permitted to decertify [its teacher education] programs" (*id.* at 4a-5a). Indeed, petitioner even filed claims in the district court alleging that certain policies of the state had adversely affected its students and faculty. See Amended Claims of Realigned Party-Plaintiff Board of Trustees For Alabama State University, No. CV 83-C-1676-S (N.D. Ala. Nov. 21, 1984). While these claims were severed from the litigation in which the preliminary injunction was issued, petitioner may well believe that it is entitled to continue to represent those interests in litigating the issues that the United States has raised. If so, petitioner should have made its intentions to do so clear to the court of appeals. It did not, however, and the court of appeals should not be faulted for failing to decipher petitioner's unstated intentions.

92 (1973); *Little Rock School District* v. *Pulaski Co. Special School District No. 1*, 584 F. Supp. 328, 352 (E.D. Ark. 1984)). Here, by contrast, petitioner alleged only that its own institutional interests were in issue. Thus, it is clear that petitioner asks this Court to resolve a conflict that does not exist.

Petitioner's claim (Pet. 10-11) that its standing must be recognized so that the interests it now purports to represent will not be disadvantaged is equally meritless. The United States and the intervenors in this litigation have adequately represented and will continue adequately to represent the students and faculty of the Alabama schools—the persons who would truly benefit from the desegregation of the Alabama system of higher education. In contrast, as its presentation in the court of appeals evidences, petitioner's principal concern has been with its own institutional interests. Thus, petitioner's further participation as a plaintiff in this case is clearly unnecessary.

In any event, this case presents a particularly unattractive vehicle in which to address the standing question that petitioner raises. The preliminary injunction that petitioner sought remains in force by virtue of the intervenors' standing; thus, the question petitioner presents would have no effect on the relief issued in the case. Moreover, the larger and ultimate questions raised by this litigation are currently pending before the Eleventh Circuit; petitioner seeks standing to raise challenges which are essentially duplicative of those raised by the United States and the intervenors. In these circumstances, we do not believe that review of the issue petitioner raises is appropriate or necessary.

2. Finally, there is no merit to the contention (Pet. 11-12) that the court below erred in addressing

the issue of petitioner's standing. To be sure, this Court has held that, where one party has standing, an appellate court *need* not consider the standing of other parties to maintain its jurisdiction, See *Secretary of the Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984); *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 & n.9 (1977). But the Court has never held that, in such circumstances, an appellate court *may* not decide whether the other parties have standing. Early resolution of such standing questions will often clarify the legal rights and duties of adverse parties and promote the economy of the litigation that remains. That is precisely the situation here—as petitioner apparently concedes. See Pet. 12 ("this case will go through further proceedings and further questions about petitioner's role will probably be raised"). Accordingly, the court below clearly did not err in addressing petitioner's standing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. CV-83-C-1676-S

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THE STATE OF ALABAMA, ET AL., DEFENDANTS

[Filed Aug. 5, 1983]

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion, defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia*, that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and

have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,

GRAY, SEAY & LANGFORD

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[Certificate of Service Omitted]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV-83-C-1676-S

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THE STATE OF ALABAMA, ET AL., DEFENDANTS

[Filed Sept. 26, 1983]

MOTION AND NOTICE FOR TEMPORARY RESTRAINING ORDER

Realigned Plaintiff Board of Trustees for Alabama State University hereby moves this Court for a Temporary Restraining Order restraining and enjoining the defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from failing and refusing to take the necessary steps to recertify the following Education Programs at Alabama State University, pending a hearing and determination of realigned plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction: Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor.

Unless this motion is granted, realigned plaintiff Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss and damage if defendants are permitted to decertify the above-enumerated programs until a hearing can be had on this motion, as more fully appears from the verified Complaint attached hereto.

DATED this 13th day of August, 1985

Respectfully submitted,

/s/ Solomon S. Seay, Jr.
SOLOMON S. SEAY, JR.

/s/ Terry G. Davis
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No. 86-749

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
Petitioner,
v.
ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

This suit was filed to dismantle the vestiges of segregation in Alabama's system of higher education. One of the principal vestiges is the manner in which the State maintains two largely segregated, predominantly black universities without providing them with the facilities, programs, and other resources necessary to enable them to attract the best students and to provide the highest quality education they can to those students—approximately half of Alabama's black college students—who attend.

Petitioner Board of Trustees of Alabama State University has for years been in the frustrating position of trying to do the best it can for its students while know-

ing that those students are being short-changed by the State and that Alabama State University is, however unwillingly, being forced by the State to participate in this shortchanging of its students.

When this lawsuit was filed, listing as defendants not only the State and numerous state officials but also all of the State's four-year colleges and universities, petitioner promptly moved for realignment as a plaintiff in order to seek, rather than resist, desegregation. Now, however, petitioner has been told that it may not do so because it is constitutionally inseparable from the State of Alabama. In fact, two of the respondents pressing that view in this Court are two *other* state universities —Auburn University and the University of Alabama— who believe they are free to proceed separately in *support* of the State, while Alabama State University (and, presumably, Alabama A & M University) are not free to proceed separately to *oppose* the State.

Ironically, none of the respondents is willing to defend the broad sweep of the appellate court's decision that petitioner is not qualified to advance the claims involved in this case. Rather, each respondent appears to acknowledge that a creature of the state is entitled to assert claims against its creator in furtherance of its own obligations under the Supremacy Clause and in pursuit of the constitutional interests of its students.[1]

Respondents argue instead that petitioner did not assert its claims in these terms, but rather did so solely in terms of its own "institutional" interests. Apart from the tenuousness of any such distinction, it is simply not true. Throughout this litigation, petitioner has made it clear that it was pursuing its Supremacy Clause obligations and representing the interests of its students and

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[1] *See* Briefs in Opposition to Certiorari filed by Auburn University at 12-13; University of Alabama at 10-11; United States at 7-8.

faculty. Its "institutional" interest thus lies in being able to provide a quality, desegregated education, as it is constitutionally obligated to do.

Thus, in the District Court, for example, petitioner's motion for a temporary restraining order, which initiated the proceedings involved here,[2] was accompanied by a complaint which alleged that the State Board's actions sought to be enjoined "have both the purpose and effect of discriminating against black students, black professionals and traditionally black Alabama State University." Complaint ¶ 7.

Similarly, on appeal, petitioner relied on the same standing cases as cited in its Petition for Certiorari and said:

> The reasoning behind these cases is that the school authority, under the combined effect of the Supremacy Clause and the Fourteenth Amendment, has the right to bring suit against the state to compel the state's obedience to the federal constitutional command that it take affirmative steps to eradicate the effects of *de jure* segregation.

Brief of Appellee Board of Trustees for Alabama State University, No. 85-7582 (11th Cir.) at 23.[3]

Finally, petitioner concluded its brief on the appeal in the following manner:

> No school is pleased when its graduates are unsuccessful, even when the level of success has its roots in discrimination and when it is measured by an invalid test. Alabama State University is no exception, and that is why it is in this lawsuit, as a realigned plaintiff, seeking a remedy on behalf of itself and its present and future students and faculty,

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[3] Copies of this brief, as well as the brief filed by petitioner in the Eleventh Circuit in the pending appeal on the merits, No. 86-7090, have been lodged with the Clerk of this Court.

[2] This motion has been reproduced in the Brief of the United States in Opposition at 4a-5a.

> that will disestablish the State's historic dual system of segregated education and that will enable Alabama State [University] to provide the highest quality education for all.

Id. at 46.

It must be remembered that the foregoing debate concerns the question of petitioner's standing or capacity to assert claims under the Constitution and under the Civil Rights Act of 1964; ultimately, these are major questions of justiciability under Article III. Moreover, they arise in the sensitive area of public education, where the ability of a school or school board to bring suit has frequently been essential to the preservation of fundamental rights. *E.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Brewer v. Hoxie School District No. 4*, 238 F.2d 91 (8th Cir. 1956); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). The number of recent school desegregation cases (many of them cited in the Petition for Certiorari) in which school districts and school boards have been plaintiffs shows the continuing importance of this role. Based on the appellate court's decision, school boards could no longer challenge state segregation in this way, but would instead have to remain as defendants even where they wish to remedy, rather than defend, such unconstitutional conduct. Such a drastic alteration in the law of standing should not take place in the absence of review by this Court.

In these circumstances, the ordinary rule against unnecessarily deciding questions of justiciability applies with unusual force. Respondent University of Alabama points out that "this Court has long held that under the 'case' and 'controversy' limitation of Article III of the United States Constitution, it should not decide issues that are not ripe for decision." Brief in Opposition at 3. And the United States adds that "this case represents a particularly unattractive vehicle in which to address the standing questions that petitioner raises." Brief in Op-

position at 8. Even though the court of appeals ignored this salutary advice, the respondents nonetheless urge that its decision be allowed to stand.

Petitioners believe the Eleventh Circuit's decision is precisely the sort of incautious holding, on a delicate question of justiciability, that should not have been embarked on unless it was necessary. If this Court is not prepared to address the issue itself, it should at least remove the problem by vacating the decision of the court of appeals insofar as it addressed the issue of petitioner's capacity to sue.

Respectfully submitted,

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